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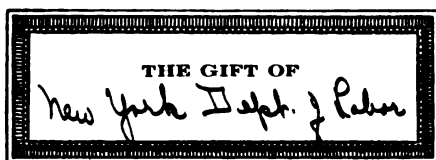
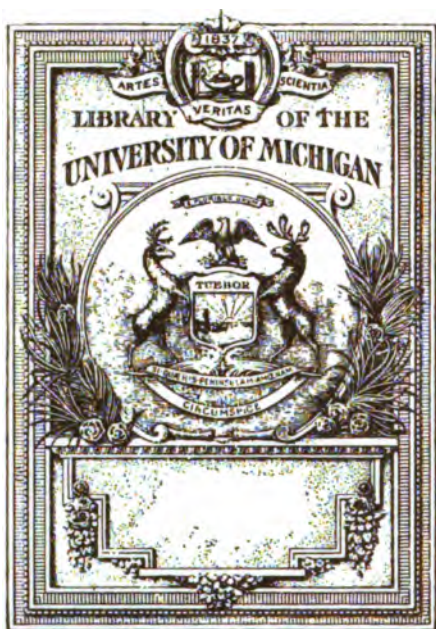
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STATE OF NEW YORK

# DEPARTMENT OF LABOR

## SPECIAL BULLETINS

Issued Under the Direction of  
THE INDUSTRIAL COMMISSION

1917


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Nos. 80-86

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ALBANY  
J. B. LYON COMPANY, PRINTERS  
1918



**NOTE.**—Beginning with 1914 the former quarterly bulletin was superseded by the present series of separate bulletins on particular subjects. As each bulletin stands by itself, a volume arrangement is not followed in this series, but this title-page and list of bulletins is furnished for those desiring to bind the bulletins by years.

### **SPECIAL BULLETINS OF 1917**

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ALBANY  
J. B. LYON COMPANY, PRINTERS  
1917

**STATE OF NEW YORK**  
**DEPARTMENT OF LABOR**  
**SPECIAL BULLETIN**

**Issued Under the Direction of**  
**THE INDUSTRIAL COMMISSION**

**No. 80**  
**March, 1917**

**FATAL ACCIDENTS DUE TO FALLS**  
**IN BUILDING WORK**  
**THEIR FREQUENCY, CAUSES**  
**AND PREVENTION**

**Prepared by**  
**THE BUREAU OF STATISTICS AND INFORMATION**



Gen.  
9/17

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U. S. Bureau of Statistics & Information 4-16-179





## FREQUENCY AND CAUSES

Approximately four times as many people are employed in the factories of New York State as are employed in building and construction work. Yet during the four years from October 1, 1910, to September 30, 1914, more fatalities due to accidents occurred in building and construction work than in factories. The numbers were: building and construction work, 1,641; and factories, including 204 fatalities resulting from three large factory fires, 1,285.

The 1,641 fatalities in building and construction work were distributed by causes as follows:

FATAL ACCIDENTS IN BUILDING AND CONSTRUCTION WORK, 1911 TO 1914.

Cause	Number
Fall of person.....	545
Mechanical power.....	518
Weights and falling objects.....	246
Heat and electricity.....	239
Miscellaneous.....	93
<b>Total.....</b>	<b>1,641</b>

It will be seen from the above table that fall of person caused more fatalities than any other single cause, and, except for mechanical power, approximately as many as all other causes combined. A classification of the fatal accidents due to fall of person is as follows:

CLASSIFICATION OF FATAL ACCIDENTS DUE TO FALL OF PERSON IN BUILDING AND CONSTRUCTION WORK, 1911 TO 1914.

Location	Number
From girders, joists, roofs, etc.....	203
From scaffolds.....	154
Into shafts, hoistways and other openings.....	52
From ladders.....	39
From telephone poles, etc.....	13
Into trenches, excavations, etc.....	9
Collapse of structure or part.....	7
On stairs, steps, etc.....	6
Fall by slipping, not elsewhere classified.....	4
Fall by tripping, not elsewhere classified.....	4
Other or indefinite.....	54
<b>Total.....</b>	<b>545</b>

Details of typical accidents such as those tabulated above are as follows:

### FALLS FROM GIRDERS, JOISTS, ETC.

**Bridgeman.**—While walking on planks across opening, planks spread and worker fell 53 feet.

**Carpenter.**—Was carrying a plank across beam, lost foothold and fell from 22d floor to street.

Carpenter.—Plank across stair well broke, causing him to fall from attic to cellar.

Helper.—Plank gave way and he fell through elevator shaft from tenth floor to basement.

Iron worker.—Lost his balance while standing on boards across hatchway and fell from eleventh floor to basement.

Iron worker.—Took a piece of joist to sixth floor, placed same across elevator shaft and sat on it. Joist gave way and he fell six floors to cellar.

Steel erector.—Plank upon which he was standing turned and he fell eight stories.

Waterproofeer.—Walked across plank over area and fell to cellar below.

Occupation not stated.—Walking from one girder to another, stepped on piece of plank which tipped, and he fell 15 feet, striking on head.

#### FALLS INTO SHAFTS, ETC.

Apprentice (housesmith).—Fell eleven floors through hoist shaft.

Carpenter.—Stuck head into hod-hoist shaft and was struck by descending car. Fell seven stories.

Iron worker.—Fell through elevator shaft.

Laborer.—While wheeling barrow backwards, wheel caught between planks of runway, man lost balance and fell through shaft.

Laborer.—Fell down hod-hoist shaft from twelfth to first floor.

Laborer.—While carrying concrete in pails for concreting around manhole, foot slipped and he fell through manhole.

Laborer.—Was lowering bolts by a cord when he lost his balance and fell through opening.

Laborer.—While building scaffold, walked through open space in floor.

Mason's laborer.—Fell down hod-hoist shaft from fifth floor.

Sign-painter's helper.—Walked into elevator shaft when gates were up.

#### COLLAPSE OF SCAFFOLD.

Bricklayer.—Fell from scaffold when supporting timber broke.

Carpenter.—Had nailed piece of  $\frac{3}{4}$  x  $2\frac{1}{2}$  flooring to side of house and fastened bracket of scaffold to it. The nails were driven into grain wood, causing it to split.

Carpenter.—Fall of thirty feet caused by breaking of plank supports.

Carpenter.—Scaffold upright broke, causing side of scaffold to fall.

Farmer (constructing).—Thrown to ground by collapse of scaffold.

Helper (steam fitter).—Fall caused by collapse of scaffold.

Iron worker.—Upright of scaffold slipped, tilting scaffold and causing fall.

Iron worker.—Fall caused by breaking of 4 x 4 upright of scaffold.

Iron worker's helper.—Scaffold, on which he was standing drilling holes, collapsed.

Laborer.—Fall caused by collapse of scaffold.

Mason.—While building a wall, swinging scaffold broke in center.

Painter.—Fell from scaffold when it collapsed.

Sheet metal worker's apprentice.—Cross joint of scaffold broke as he stepped upon scaffold.

Stripper (concrete).—Fell when scaffold collapsed.

## BREAKING OF SCAFFOLD ROPE.

Painter.— Scaffold fell when slip-knot loosened.

Painter.— Fall due to breaking of chain which supported scaffold.

Painter.— While scaffold was being lowered, rope broke, causing him to fall about 20 feet.

Sheet metal worker.— Rope broke, causing one end of scaffold to drop and throwing him to ground. Rope was not wrapped with burlap at supporting points.

Sheet metal worker's helper.— Fall caused by breaking of rope which supported scaffold.

Sign-painter.— Fell when rope on water tower scaffold broke.

## FALLS FROM SCAFFOLD.

Carpenter.— Laying shingles on eaves while standing on scaffold which extended beyond end of beam. Evidently had a dizzy spell and fell off.

Carpenter.— A strong wind was blowing and it is supposed he lost his balance or was blown off.

Carpenter.— Fell from scaffold when he suddenly became dizzy.

Iron worker.— While moving plank he lost his balance and fell from scaffold.

Painter.— Fall from scaffold probably due to attack of dizziness.

Painter.— Was holding to pipe while painting from scaffold. Pipe gave way and he fell.

Tinker.— Fall from scaffold probably due to attack of dizziness.

## BREAKING OF LADDER.

Painter.— Fall due to breaking of ladder.

Painter.— Defective rung in ladder broke under his weight.

Painter.— Near top of ladder when it broke, causing him to fall.

## SLIPPING OF LADDER.

Carpenter.— Fell when ladder slipped from scaffold.

Painter.— Painting roof when ladder slipped from porch and caused him to fall.

Painter.— Thrown to ground when ladder slipped.

Plumber.— Bottom of ladder slipped causing him to fall to floor.

Steeple jack.— Fell when ladder against tower slipped.

Occupation not stated.— Cleaning sash when ladder slipped from under him and he fell about ten feet.

## PREVENTION

### REQUIREMENTS OF THE LABOR LAW

Long before there were such statistics as those above \* to demonstrate the hazard, the danger of falls in building work was sufficiently recognized to be the subject of legislation. In 1885, two years before the first law concerning safety in factories was enacted, an act was passed requiring that scaffolds, hoists, stays, ladders and other mechanical apparatus used in building work should be safe. This was the original of the first paragraph of what is now section 18 of the Labor Law. Except for some change in language and the extension of the safety requirement to cover "operation" of apparatus as well as proper materials and construction, that paragraph has remained practically the same until now, its reading since 1897 being as follows:

A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged.

It will be seen that the above is a very general requirement declaring that scaffolding, hoists, stays, ladders, etc., shall be safe but containing no specification of what is necessary to make them safe. Subsequent laws, however, have laid down some such specifications. In 1891 what is now the second paragraph of section 18 was added requiring guard rails on scaffolds and that the latter should be secured against swinging away from the building. These have continued in the law ever since with but slight modification, that part of section 18 now reading as follows:

Scaffolding or staging swung or suspended from an overhead support, or erected with stationary supports, more than twenty feet from the ground or floor, except scaffolding wholly within the interior of a building and which covers the entire floor space of any room therein, shall have a safety rail of suitable material, properly bolted, secured and braced, rising at least

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\*Reporting of accidents in building work to a state department was not required in New York State until 1910.

thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with such openings as may be necessary for the delivery of materials, and properly attached thereto, and such scaffolding or staging shall be so fastened as to prevent the same from swaying from the building or structure.

In 1896 requirement of the covering of floors during the construction of a building was enacted for all cities of the State and has been in force ever since. This became incorporated in the first part of section 20 of the Labor Law. Since 1913, when the original requirement of 1896 (in force until then) was strengthened in one or two particulars, that part of section 20 has been as follows:

All contractors and owners, when constructing buildings in cities, where the plans and specifications require the floors to be arched between the beams thereof, or where the floors or filling in between the floors are of fire-proof material or brickwork, shall complete the flooring or filling in as the building progresses. If the plans and specifications of such buildings do not require filling in between the beams of floors with brick or fire-proof material all contractors for work, in the course of construction, shall lay the under-flooring thereof on each story as the building progresses. Where double floors are not to be used, such contractor shall keep planked over the floors, two stories below the story where the work is being performed. If the floor beams are of iron or steel, the contractors for the iron or steel work of buildings in course of construction or the owners of such buildings shall thoroughly plank over the entire tier of iron or steel beams and extending not less than six feet beyond such beams on which the structural iron or steel work is being erected, except such spaces as may be reasonably required for the proper construction of such iron or steel work, and for the raising or lowering of materials to be used in the construction of such building, or such spaces as may be designated by the plans and specifications for stairways and elevator shafts.

In 1899 requirement of specific guards for hoistways and prohibition of hoisting of material on the outside of buildings over four stories in height were enacted. With but slight change these have continued in force ever since in the latter part of section 20 of the Labor Law which now reads as follows:

If elevators, elevating machines or hod-hoisting apparatus are used within a building in the course of construction, for the purpose of lifting materials to be used in such construction, the contractors or owners shall cause the shafts or openings in each floor to be inclosed or fenced in on all sides by a barrier at least eight feet in height, except on two sides which may be used for taking off and putting on materials, and those sides shall be guarded by an adjustable barrier not less than three nor more than four feet from the floor and not less than two feet from the edge of such shaft or opening.

It will be seen that these provisions of law are aimed almost wholly at precisely the kind of hazards indicated by the statistics above as the source of many serious accidents due to fall of person. Since these provisions have been in the statutes for many years, the question is at once suggested whether these provisions have not largely failed of their purpose. That, in fact, is the conclusion to which the logic of the facts points. In so far as that conclusion is justified, the further question arises whether the failure of the legal requirements is due to their inherent inadequacy for the purpose or to their non-observance. Obviously, however, the adequacy of those requirements to prevent accidents due to falls in building work cannot be judged by means of the above statistics if it appears that those requirements have not been observed. As a matter of fact the evidence is quite clear that they have been very commonly disregarded. This evidence is as follows:

In April and May, 1913, an investigation was made of all buildings over three stories in height, except some frame dwellings, under construction in Buffalo, Rochester, Syracuse and Utica. During May and June of the same year a similar investigation was made of 132 buildings in New York City.\*

In the up-state cities none of the buildings inspected had hoistways guarded according to § 20 as quoted above. In a few instances one or two sides of the shaft were enclosed to a height of six or seven feet. In such cases the guards were installed at the order of the insurance inspector. But even in these few instances, no "adjustable barriers" were in use on the unfenced side of the shaft. Floor openings, sometimes from the sixth floor or above to the basement, were also unguarded.

In most of the buildings inspected in up-state cities there was an entire absence of hand-rails on scaffolds. In fact, in only one instance was the spirit as well as the letter of the law observed; in this case the contractor frankly admitted that his elaborate system of rails and guards was due in part to the fact that this was a commission job. In a few other instances a flimsy, insecure railing was constructed, usually after the foreman had been cautioned by the inspector. In one instance a swinging scaffold was equipped

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\*This investigation was made by the Bureau of Statistics and Information.

with upright iron posts or rods but the foreman had not seen fit to adjust a rope or chain through the eyes of these posts to form a protective railing. In the same city several contractors told the inspector that to their certain knowledge only one building had ever been constructed there with the aid of a railed scaffold.

Two buildings were found in up-state cities which had no flooring whatever. In one of these the iron workers were at work on the roof of the seventh story. Between them and the ground floor were twelve planks — two at each story, used to form a ladder platform. Information was obtained concerning several other recently constructed buildings in which the law was similarly violated.

The inspection in New York City produced similar results. Of the 132 buildings inspected, 110 had hoistways and well holes in use which were not guarded as provided by § 20 of the Labor Law; 52 were equipped with unguarded scaffolds, in violation of § 18; and 34 did not have the floor covered as prescribed in § 20. It should be noted that in 80 of these 132 buildings, the steel work had been completed at the time the inspection was made; and 60 of them were enclosed as well. This may help to explain the relatively small number of violations of the law as it relates to the guarding of scaffolds and the covering of floors.

It may be said that in 1913 the provisions of the Labor Law which apply to the construction of buildings were generally ignored. This was not because of malicious intent to evade the law for no subterfuges were employed for the purpose of deception. Ignorance of the law and indifference to its purposes were perhaps the reasons for its violation.

That conditions have not changed much, if any, since 1913 is shown by a similar investigation\* of 505 buildings under construction in New York City made during the nine months from October 1, 1915, to June 30, 1916. Of these 505 buildings, 309 had unguarded hoistways and elevator shafts; 236 had unguarded scaffolds; and 157 were not underfloored as required by § 20 of the Labor Law.

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\*By the Division of Industrial Hygiene

In the face of the foregoing evidence of general disregard of the existing requirements of the Labor Law, the question arises why they are not better observed and this inevitably resolves itself into a question of enforcement.

It has been a misdemeanor to fail to observe section 18 since 1893, or section 20 since 1896. Down to 1899 the duty of enforcing both sections in cities was laid upon local police or building authorities, that duty so far as section 18 was concerned being specified only when complaint concerning scaffolds was made. Since 1899 the duty to enforce both sections has devolved upon the State factory inspector or the Department of Labor without geographical restriction (section 20, however, has never applied outside of cities) down to 1916 when for New York City the enforcement of both sections became the duty of the local authorities exclusively, the State jurisdiction still continuing elsewhere. Since 1899 the enforcement of section 20 continued to be the duty of local building authorities also, but from 1899 to 1911 the enforcement of section 18 devolved only upon the State authorities. Since 1911, however, in cities it has been the duty of local building authorities also, to enforce section 18.

The foregoing brings out the fact that there has been varying, divided or double jurisdiction in this matter, as between local and State authorities. Such a condition clearly does not make for centralized responsibility which, on general principles, is necessary for efficient enforcement of law, and this is probably one reason for the lack of better enforcement which has been noted.

So far as the State authorities are concerned, another reason appears in the failure to couple with the duty to enforce means for the systematic performance of that duty. It is perfectly obvious that such requirements can be adequately enforced only by systematic inspection of building work, but no duty of inspection has been prescribed by law save only a direction to inspect when complaint is received in the case of scaffolds. Furthermore, at the outset it was assumed, and the assumption has continued ever since, that the inspection of building work found necessary could be performed by the factory inspectors in addi-



tion to their other duties. This assumption in later years would seem to have been unconsidered rather than deliberate, but in any case it has always failed surprisingly to take account of the constant complaint of inadequate forces to inspect factories alone, for which inspection has always been mandatory, or the amount of work and distinctly different technical problems involved in inspection of building work. The result has been that not only in earlier years, when the enforcing duty was enjoined only in case of complaints, but also later, after general duty to enforce was specified, the Department of Labor has limited itself almost entirely to enforcement upon complaint. There has been some enforcement independent of complaints, as in the case of the investigations in 1913 and 1916 above referred to, in connection with which orders to correct violations found were issued. At the present time also, investigations are being made up-state of scaffold accidents reported in the newspapers, with issuance of orders when necessary. But such intermittent and partial efforts leave the general problem of enforcement almost untouched.

Another phase of enforcement in this field also shows a record of negative results. This appears in the failure of a policy of dependence upon complaints by employees to bring violations of law to light. Such complaints have always been very few in number, so rare, comparatively speaking, as to indicate that a policy of dependence upon complaints is futile.

In short, a review of experience as to enforcement of these provisions of the Labor Law, leads inevitably to the conclusion that the matter of enforcement has never been sufficiently studied or adequately provided for, and that one step at least toward prevention of falls in building work should be a study of this problem to the end that the existing safety provisions of law shall be everywhere observed.

Another step to be taken would naturally be an examination of the present provisions of law as to their adequacy, if observed, for the prevention of falls. The fact that with but few modifications these provisions date back almost, if not quite, twenty years, raises a fair presumption that amendments or supplemental regulations ought now to be added, especially in view of the great

strides in knowledge and technique of safety work in the last few years. Examples of such possible supplemental regulations may be seen in following pages.

#### MEANS OF PREVENTION IN GENERAL

But discussion of legal requirements is not the main purpose of this bulletin. It is not necessary, and less so today than ever before, to depend upon legal requirements alone for the promotion of safety in industry. Consideration for the welfare of employees, and the possibility of reducing economic loss from accidents made definite and specific by the compensation law both weigh with employers to take measures voluntarily for prevention of accidents. It is to emphasize the seriousness of the particular hazard here considered, and to suggest means of prevention for it in general that is the aim here. Accordingly, in following pages are summarized, from such sources as were at hand, measures recommended by experts which are calculated to prevent injury to workmen by falls in building work. There is every reason to believe that use of measures such as these would prevent a very large proportion of the startling number of fatal accidents due to falls in building work which are now occurring.

#### Scaffolds

A recent publication by the Travelers' Insurance Company on "Safety Engineering Applied to Scaffolds" gives a complete description of the various kinds of scaffolds and the methods of insuring safety to the men working upon and around them. This is the first comprehensive study of American experience in scaffold construction from the standpoint of safety. Most of the following recommendations are based upon the descriptions contained in this treatise.

Scaffolds are roughly grouped into three main classes — pole, suspended and outrigger. Pole or fixed scaffolds are most common. In these the weight is supported by poles or uprights which remain in place until the wall is completed. The bricklayers' pole scaffold utilizes the wall itself for supporting the inner edge of the working platform and hence requires but one row of poles or uprights. Pole scaffolds are used almost exclusively in constructing buildings not over five stories in height and higher ones that have no framework of structural steel.

In the construction of high buildings with steel framework swinging or suspended scaffolds are used. Such a scaffold consists of a platform swung by steel cables from the upper part of the steel framework of the building in such a manner that it can be conveniently raised and lowered.

Outrigger scaffolds consist of platforms supported upon beams which extend out through windows or other openings in the walls and which are secured to the framework or flooring within the building. Outrigger scaffolds are not recommended when some other kind can be used.

#### POLE SCAFFOLDS

Poles or uprights should be straight, straight-grained and free from bad knots and other imperfections. They should be set as nearly vertical as possible to insure stability of the scaffold. They should be set as near the wall as possible. The standard distance from the wall to the poles in a bricklayers' pole scaffold is 4' 6". Poles should not be spaced farther apart than 7' 6" from center to center. They should be fixed at their lower ends to prevent displacement.

Cleats for splicing poles should be not less than 1 $\frac{1}{4}$ " thick and should be wider than the poles. They should overlap each pole not less than 2'. There should be two cleats to every joint or splice and these should be on adjacent and not on opposite sides of the poles. Wherever possible the practice should be followed of breaking joints when splicing poles.

Ledgers should be fastened to the inside of the pole. This shortens the span for the putlogs. The vertical distance between ledgers should not exceed 5' 2". Each ledger should be fastened to each pole with 5 first-class cut nails of large size, preferably 10-penny. Wire nails should never be used for this purpose.

Putlogs should be close grained, sound and free from knots. There should be at least three putlogs to every plank — one at each end and one in the middle. They should rest on the ledgers as close to the poles as possible.

Planks should be carefully selected, straight-grained, sound, and free from bad knots or other defects. The standard size is 2" x 9" x 16'. When such planks are used they should be laid 5 wide. The space between the outer poles and the wall should be

filled in as nearly as possible to prevent the falling of men or materials. If the scaffold is properly built there is no necessity for fastening the planks to the putlogs since the weight of the planks and the load they carry is sufficient to prevent their displacement. Planks should not abut on the same putlog.

Pole scaffolds should be braced not only to insure stiffness to the scaffold itself but also to prevent the scaffold as a whole from falling away from the building. The poles should also be supported by longitudinal bracing to prevent the scaffold from collapsing parallel to the wall. All braces should be of adequate size and of suitable material.

A guard-rail should be constructed for pole scaffolds, so placed that the height from the platform to the upper edge of the rail is 40". These rails should be at least 6" x 1" and should be securely nailed to the side of the poles facing the platform. Two guard-rails, the upper one 40" high, are preferable to one.

A foot-board should project above the platform at least 7". It should make a tight joint with the platform in order to prevent materials from falling.

Wherever possible a netting of stout wire, having meshes not greater than  $\frac{1}{2}$ ", should be used along the outer edge of the scaffold platform. This netting should extend from the guard-rail to the foot-board and should be securely fastened to both.

#### SUSPENDED SCAFFOLDS

The use of swinging or suspended scaffolds is limited, in new work, to buildings with steel or concrete skeletons. When properly constructed such scaffolds are the most economical and the safest for use on high buildings. The flexibility of suspended scaffolds is an asset in the construction of modern high buildings.

The attachment and care of cables should be in charge of men who are skilled in such work. It is quite common for builders to lease scaffolds instead of owning them. In such cases the erectors and caretakers of the scaffolds are men skilled in such work.

The platform should be tight enough to prevent the smallest tool from dropping through. It should hang close enough to the building to prevent men from falling through between the platform and the wall. Planks are usually 2" x 9" x 12' or 14'. They

should overlap at least 1': an overlap of 2' is preferable. Workmen should never be permitted to drop objects upon the platform as this practice strains the scaffold much more than does the weight of the objects alone.

Suspended scaffolds should be equipped with hand-rails, the upper one, if two are used, being 40" high. It should be securely fastened and strong enough to resist the shock caused by a large man falling heavily against it. Rope is inferior to wood for guard-rails.

A foot-board, extending at least 7" above the platform, should be placed around the platform, inside of the cables. It should fit snugly to the platform at all points to prevent materials from falling through.

A side screen, consisting of stout wire with not over  $\frac{1}{2}$ " mesh, should be used on the outside and across the ends of platforms. It should be attached to both guard-rail and foot-board.

Because of the presence of workmen above those who work on suspended scaffolds, creating a hazard from falling rivets, bolts, hand tools, etc., such scaffolds should be equipped with protecting covers. Canvas shields placed 3' to 6' above the heads of the workmen are sometimes used for this purpose. Planks or wire mesh are also used. Canvas is most expensive and generally least satisfactory. Wire mesh is perhaps most satisfactory. It permits the free passage of light, weighs less than plank and is not seriously disturbed (as is canvas) by high winds. Where wire is used the mesh should not be over  $\frac{1}{2}$ ".

Life lines and safety belts for men who go out on thrust-outs to attach or adjust swinging scaffold machines are common in Europe but are seldom seen in this country.

#### OUTRIGGER SCAFFOLDS

As already noted, outrigger scaffolds are not recommended where some other form can be used. Where they are used to support workmen and materials they should be reinforced by external struts and braces wherever possible.

Sometimes the height of an outrigger scaffold is increased by building a horse scaffold upon it. Such practice is to be avoided if possible. But wherever outrigger scaffolds alone or outrigger

and horse scaffolds are used, they should be equipped with guard-rails, foot-boards and side screens.

Outrigger scaffolds are suitable for use as protective roofs over suspended scaffolds and as catch platforms. It is desirable to have auxiliary platforms at suitable places to arrest the fall of objects from suspended scaffolds or other parts of the building where material is apt to fall. Especially should doorways and passageways be protected by catch platforms when men are working above.

#### BRACKET SCAFFOLDS

It is not sufficient for the bolts in the brackets of a carpenter's scaffold to extend through the outer sheathing of the building only. They should pass through a board placed across the inside of two vertical studs as well.

In laying the platform of carpenters' scaffolds care should be taken to avoid "traps." This can be done by having a sufficient number of brackets so that the boards of the platform will not overlap between brackets. At any rate it is desirable to have enough brackets to prevent the platform from sagging. If necessary two layers of boards should be used instead of one.

Guard-rails are seldom found on carpenters' scaffolds though they can be and should be used. Foot-boards are also recommended and in some cases side screens, though the latter are not always essential.

#### PAINTERS' SWINGING SCAFFOLDS

The painters' scaffold consists of a light platform made of boards laid upon a horizontal ladder and the whole suspended by ropes from hooks or some other form of support. The hooks used to support the scaffold and to attach it to the building should be sufficiently large for the purpose and should be constructed of first-class material.

Where manilla rope is used it should be of long fiber, at least 1" in diameter, and double lashed at each point of suspension. All ropes should be protected by bagging or wooden blocking at the points where they come in contact with sharp edges. Rope knots should have the ends tied with smaller cord to prevent them from becoming untied. The free rope which accumulates when the scaf-

fold is at a high level should be coiled upon the platform rather than allowed to hang down where it may be interfered with by curious or meddlesome persons or be fouled in some other manner.

The ladder which forms the base of the painters' scaffold platform has its side-bars parallel and slightly farther apart than usual. It may be strengthened by extending a small wire rope, about 5/16" in diameter, along the under surface of the side-bars, from end to end.

All painters' scaffolds should be equipped with guard-rails and foot-boards similar to those already described.

#### SCAFFOLDING MATERIAL

Great care should be exercised in the selection of material for scaffolds. Newness is not a sufficient test of strength. All wood should be straight grained and free from knots, injurious ring-shakes or other defects.

Green wood should be avoided in constructing scaffolds. Wet wood is even less resistant than green. All woods gain in strength and stiffness when thoroughly air seasoned or kiln dried. Air seasoned wood is about twice as strong and kiln dried wood three times as strong as green wood.

Not only is wet wood to be avoided but also that which is alternately wet and dry often. The latter rots very quickly and planks so treated soon become unsafe. Lime also eats into wood and weakens it.

Spruce is probably the most suitable of the woods that are available for use in scaffolds, though long-leaf yellow pine is acceptable if it is of first-class quality. Hemlock is not good as it is too brittle.

Selected cut nails or bolts are best for fastening the parts of scaffolds together. These should be of sufficient size for the particular purpose they are expected to serve. Wire nails are not suitable for use in scaffolds.

Ropes should be long fiber manilla and frequently tested for strength. Acid weakens rope but the effect is not noticeable immediately. This fact should be taken into account in making tests.

Cables should be made of steel wire and must be flexible as well as strong. If they do not possess a considerable degree of flexi-

bility they may be damaged in winding upon the drums. Some scaffold builders galvanize their cables since this process makes the cables better able to resist the action of the weather. Where they are not galvanized some approved preservative preparation should be applied.

#### CONSTRUCTION OF SCAFFOLDS

All scaffolds should be constructed by men who understand the strength of the materials used and who know the load the scaffold they are building is expected to support. A special foreman should be in charge of and be held responsible for this work. Likewise all alterations should be made under his direction.

The common practice of using inferior or insufficient material should be corrected. Care should be taken also to see that all parts of the scaffold are entirely completed. Occasionally a workman engaged in constructing a scaffold is interrupted in his work. In such cases he may forget where he left off work and leave some part of the scaffold in an unfinished and hence in a hazardous condition.

Boards and planks, especially those that are not fastened, should not project far over the putlogs or beams. All projecting nails and splinters should be removed.

Scaffolds should not be used until they are entirely completed including bracing, hand-rails, and foot-boards. After they are completed they should not be interfered with in any manner by other parties than the erectors.

As soon as scaffolds have served the purpose for which they are constructed they should be dismantled. Dismantling should proceed from the top downward (in pole scaffolds, especially). The safer plan is to lower the parts rather than to throw them down. This is also the more economical plan since a smaller amount of material is broken up in this manner.

#### LOADING OF SCAFFOLDS

Suspended scaffolds, while yet close to the ground, should be thoroughly tested before they are used. Double the weight to be suspended, when measured in dead load, is not a sufficient test of the strength of the scaffold. There should be a safety factor of at least four because of the strain caused by the live load in moving



about on the scaffold. All ropes should be tested by at least four times the weight they are expected to support.

Having determined the load a scaffold is expected to sustain and having found by test that the scaffold is able to carry such load, it should not be overloaded at any time. It should not be used as a place of storage for objects that are either bulky or heavy. Material should not be piled upon the scaffold platform faster than the needs of the workmen require. It should be distributed in a reasonable manner and not concentrated at a few points.

Hod-carriers should not be permitted to throw brick, mortar, or other material from their shoulders to the scaffold platform since the shock caused by such practices may result in serious accidents. In like manner workmen should not be permitted to jump upon the platform from a higher level.

#### INSPECTION OF SCAFFOLDS

*Every* scaffold should be inspected by a competent man each time it is completed but before it is used. This is essential even when it is to be used for only a few hours for then it is perhaps most likely to be poorly constructed. The inspection should be especially thorough when an accident may endanger a large number of persons, whether workmen or otherwise.

Inspection should cover all parts of the scaffold, including hand-rails, foot-boards, and screens and should extend also to the part of the building above the scaffold and near the plane of the wall that is being erected.

In addition to the regular inspection, every foreman should examine the scaffold and satisfy himself of its safety before allowing his men to use it.

All scaffolds should be thoroughly inspected and repaired after every storm or high wind. Because the position of scaffolds is constantly changing there should be an inspection every day. A more thorough inspection should be made once a week. The inspector should be required to make a written and signed report of every inspection, covering every important element of the scaffold.

Every man who works about the scaffold should be encouraged to report defects which he finds and suggest remedies for them.

### Ladders

The side bars of ladders should be of straight-grained spruce and free from defects. The rungs should be of oak, hickory or ash and should be split and shaved to size and not turned.

A ladder used for the transport of materials should not be over 30' or 35' in height. It should project above the landing to which it extends at least 5'. If it is too short to permit this, stout strips should be nailed to the side bars.

One rung should be flush with the platform to which the ladder leads. If this is not practicable the rung nearest the platform should be above and not below the platform.

Generally speaking, it is better to use single length ladders with intervening platforms than to use extension ladders in building construction.

Ladders up which material is carried should not be located over each other or over an unprotected area where men are at work or pass frequently. Wherever possible, material should be raised or lowered with ropes and not carried on ladders.

Men should go up or down ladders one at a time so that they cannot drop material upon each other. Wherever possible, two-ladder ways should be constructed: one for the use of men going up and the other for the use of men going down.

Both the foot and the top of the ladder should be secured. The side bars should rest evenly upon a firm and level foundation. The ladder should be rigid and should not spring when in use. If it is not already sufficiently stiff it should be stayed at the middle by a brace.

Ladders with missing or broken rungs or defective side bars should not be used until they are repaired. Defective side bars should not be spliced but should be replaced. Ladders should not be used when the rungs are loose enough to roll.

Rungs or steps of ladders should always be notched-in or housed. All ladders should be made and repaired in a workmanlike manner and should not be hastily constructed of scraps, some of which are unsuitable for such use.

### Temporary Floors

Not much need be said concerning the remedy for the hazards involved in leaving out the flooring from the steel framework of buildings. The absence of the flooring constitutes the hazard.

The remedy is simply to supply the flooring. At least a temporary floor should be laid within two stories of the highest point at which iron workers are at work. With but little added labor and expense the lives of the workers could be much better safeguarded by putting in a temporary floor within one story of the workers. In laying temporary floors "traps" should be avoided.

Because of the peculiar hazards of their work structural iron workers should be temperate, cool-headed, strong, active and healthy. They should not be permitted to work in exposed places during high winds nor at times when the beams are slippery from rain or frost. They should never be permitted to work in exposed places long enough to become unduly fatigued. Neither should they be permitted to engage in spectacular performances nor to expose themselves to unnecessary risks.

#### Hoistways

Like the absence of floors, the hazard of unguarded floor openings is apparent and the remedy is simple. The hazard exists because the openings are unguarded; the remedy is an effective guard around all floor openings. All hoistways and elevator shaft openings in each floor should be enclosed or fenced in on all sides by a barrier at least 8' in height, except on two sides where materials are taken off or put on the elevator or hoist. These two sides should be provided with an adjustable barrier not less than 2' from the edge of the shaft. Likewise all other floor openings should be guarded by enclosure walls and adjustable barriers.

#### The Human Factor

Undoubtedly many accidents in building and construction work, as in other industries, are traceable to the ignorance, carelessness or indifference of the workmen rather than to defects in materials or construction.

Workmen, like other people, are bundles of habits. These habits are formed very largely through suggestions received directly or indirectly from their environment and through imitation of other people. By constantly repeating the same actions day after day they come to be more or less involuntary and do not require the conscious judgment of the worker. Hence some accidents that are charged to carelessness should be charged to ignorance and incor-

rect habits instead, recognizing that these habits are not always the results of deliberate judgment but are formed more or less unconsciously.

In order to eliminate the accidents due to incorrect habits of the workmen, we must change these habits. This is a difficult task but it can be accomplished in the same manner that other kinds of habits are changed. The foremen and sub-bosses can do a great deal to break up the unsafe habits of their workmen by setting a good example to the men under their direction. The constantly changing conditions of building and construction work make it more hazardous than most factory work. For this reason unusually close supervision must be exercised to prevent serious accidents in building and construction work.

The foreign-born, unskilled laborer in building and construction work constitutes a peculiar problem because of his lack of acquaintance with the hazards of his work and his inability to understand the instructions given him. At the same time his habits can often be more easily changed than those of American laborers, provided his foreman sets a good example for him and teaches him in a language that the workman can understand.

In attempting to change the habits of the workmen patience and considerable repetition are required. The foreman must recognize that the minds of his workmen respond more slowly than his own to the instructions which he gives them. Because this is true the foreman should give detailed instructions concerning the work. Sometimes the instructions required seem so simple to the foreman that he considers them useless. Yet ignorance of such conditions as these simple instructions should cover is the cause of a large number of serious accidents in building and construction work. Furthermore, even simple instructions must be repeated several times in some cases before they are thoroughly understood by the laborers whose acquaintance with the hazards of building and construction work is limited.

There are, of course, workmen who will not follow instructions even though they understand them unless some form of compulsion is employed. For such workmen discipline, administered either as a temporary lay-off or as discharge, is necessary because they endanger not only their own safety but that of their fellow work-

men as well. But in the great majority of cases satisfactory results can be obtained by a tactful foreman without resort to discipline.

Care should be exercised in selecting men for building and construction work. Men with nervous ailments, subject to dizziness or attacks of faintness, partially deaf, near-sighted, or suffering from rheumatism or other affliction which might impair their mental or physical activity should never be assigned to work whose hazards would be materially increased by such ailments or defects. Youthful and inexperienced persons, even though physically sound and in good health, should not be set at work requiring skill and sound judgment.

#### Miscellaneous

All barrow runs or gangways should be at least 27" wide. Butt-joints are safer than lap-joints on barrow runs. Wherever possible all gangways should be constructed over beams since heavy loads should not be carried over unsupported planks. All barrow runs should be equipped with safety treads. Wherever materials are piled on scaffolds there should always be left a free passageway for the workmen whose duties require their presence there.

All floors, scaffolds and other places where workmen are accustomed to pass should be kept clear of rubbish and loose materials. All materials should be properly piled so that they will not cause passing workmen to stumble and fall. Likewise all rubbish of every kind should be removed to a place where it will not be a menace to the safety of workmen.

Ropes, slings and tackle should be stored in a dry place when not in use, under the charge of a responsible person. Unsafe ropes should be destroyed to avoid the possibility of their use by mistake.

Hammers, saws, axes, chisels and other tools should always be kept in safe places when not in actual use.

In dropping material workmen should make sure that no one below is exposed to danger.

All stairways and other passageways should be kept clear.

Wherever men are at work or have occasion to pass in the course of their work, light should be diffuse and uniform and never localized in blinding centers with dark spaces between. Ladders, stairways and runways should be especially well lighted.

The use of intoxicants should be prohibited both during working hours and before work begins. Intoxicated persons, whether workmen or not, should not be permitted to loiter about a building under construction since they may cause accidents to the men who are at work.

Horseplay and all unnecessary risks should be avoided.

There should be no ill-feeling between individuals or gangs working upon a building.

Each building under construction should be equipped with a first aid kit and should have at least one man trained in first aid work. It should be recognized that in rendering aid to an injured man, skill and knowledge, and not merely good intentions, are required.

The addresses and telephone numbers of several physicians should be posted in a convenient place on each job.

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STATE OF NEW YORK

DEPARTMENT OF LABOR

# SPECIAL BULLETIN

Issued Under the Direction of  
THE INDUSTRIAL COMMISSION

No. 81  
March, 1917

**COURT DECISIONS ON  
WORKMEN'S COMPENSATION LAW  
JULY 1, 1914 — AUGUST 1, 1916**

Prepared by  
THE BUREAU OF STATISTICS AND INFORMATION



**ALBANY**  
**J. B. LYON COMPANY, PRINTERS**  
**1917**



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## INTRODUCTION

The Workmen's Compensation Law of New York had been in effect two years on the first of July, 1916. During the first eleven months of its operation it was administered by the Workmen's Compensation Commission, an independent body created by L. 1913, ch. 816, as amended and re-enacted by L. 1914, ch. 41. May 22, 1915, under L. 1915, ch. 674, the State Industrial Commission took over the functions of the Workmen's Compensation Commission. Thenceforward, for a year and more, the Bureau of Workmen's Compensation in the Department of Labor has been administering the law. In addition to L. 1914, ch. 41, and L. 1915, ch. 674, five other acts have amended the Workmen's Compensation Law; namely, L. 1914, ch. 316; L. 1915, chs. 167, 168, 615; and L. 1916, ch. 622.

Altogether the number of claims and agreements for the first eighteen months of the law's operation, July 1, 1914, to January 1, 1916, was more than sixty thousand. Of this vast number less than three hundred had been appealed from the Commission to the courts up to the end of 1915. The proportion of agreement cases to claim cases is in the ratio of seventy to thirty. All appeals lie first to the Appellate Division of the Supreme Court in the Third Department, sitting at Albany, and thence to the Court of Appeals.\* Compensation cases have precedence over all other civil cases. Prior to July 1, 1916, the Appellate Division had handed down about one hundred and thirty-five, and the Court of Appeals about thirty, compensation decisions. Some ten other cases relative to compensation had been the subject of Supreme Court decisions. The important cases involving the constitutionality of the Workmen's Compensation Law have been carried from the Court of Appeals to the Supreme Court of the United States. There they have been argued and await decision.

The following presentation of the court decisions and commission rulings reveals the fact that by far the greater part of the attention and time demanded of the courts and the commission

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\* For the composition of the two courts see below, p. 898.

has been involved by the problems of coverage. The cases determining the constitutionality of the act have been, of course, of overshadowing importance. Since the law of compensation is a new and great departure, it has been thought best to give the full texts of the decisions both of the Court of Appeals and the Appellate Division in all cases.

This Bulletin can at best present only a transitory view of workmen's compensation in New York. The process of interpretation is in an intermediate stage. The decisions here reproduced are likely to be modified or may be entirely reversed by further decisions of the near future. A second series of decisions may be expected to follow the radical and far-reaching law of 1916, generally amending the Workmen's Compensation Law. The new act, which went into effect June 1, 1916, is in large part a measure originating with the State Industrial Commission, based upon the administrative experience of the Workmen's Compensation Bureau, and designed to clear up the very doubts and cure the very defects of the Workmen's Compensation Law that the court decisions here given made conspicuous. Thus, its provision for cases of disfigurement nullifies the effect of *Shinnick v. Clover Farms Co.* as a precedent; its provision for compensation of public employees notwithstanding the "pecuniary gain" clause offsets *Allen v. State of New York*; and its amendments expressly defining the right of appeal resolve the doubts in the Court of Appeals' refusal to hear *Rheinwald v. Builders' Brick and Supply Co.*\* These are but three of a score of decisions that have been nullified, modified or re-enforced as precedents by the amendatory law of 1916. In the proper place, in connection with each decision so affected, attention is hereafter called to the corresponding legislative amendment.

The daily papers of New York City and Albany afford the earliest notices of current court decisions. The State Department Reports of New York, issued semi-monthly by the Miscellaneous Reporter's office since October 1, 1914, give the full texts of many of the State Industrial Commission's rulings and also the opinions of the Attorney-General on the Workmen's Compensation Law.

\* For these decisions see pp. 59, 131, 298 following. The Shinnick decision is met by amendment of Workmen's Compensation Law, § 15, subd. 3; the Allen decision by the addition of new group 43 to § 2; and the Rheinwald dismissal by amendment of § 23.

They are referred to in this Bulletin under the abbreviation, S. D. R. The texts of the Appellate Division decisions are to be found in the Appellate Division Reports beginning with volume 165 and the texts of the Court of Appeals decisions in the New York Reports beginning with volume 215. The Miscellaneous Reports of New York, beginning with volume 90, give a few cases involving workmen's compensation. The Reports of the Attorney-General, beginning with 1914, contain occasional compensation opinions. The monthly Bulletin of the State Industrial Commission, the first number of which appeared in October, 1915, presents compensation rulings, court decisions, comments of administrative officers and current compensation items. The Bureau of Statistics and Information of the Department of Labor has issued an annotated edition of the Workmen's Compensation Law.



## CONSTITUTIONALITY

The Court of Appeals of New York, having upheld the constitutionality of the present Workmen's Compensation Law in *Jensen v. Southern Pacific Co.*, and *Walker v. Clyde Steamship Co.*, these cases, together with *Winfield v. N. Y. Central & H. R. R. R. Co.*, and *White v. N. Y. Central & H. R. R. R. Co.*, relative to interstate and foreign commerce, have been argued before the Supreme Court of the United States. On November 13, 1916, the Supreme Court ordered a reargument on the cases involving the constitutionality of the New York compensation law, as well as on similar statutes of Iowa and Washington. The constitutionality of compensation laws generally will be determined by the decisions in these cases.\*

The opinion in *Jensen v. Southern Pacific Co.*, rendered on July 13, 1915, upheld the constitutionality of the Workmen's Compensation Law generally. It also held that the Federal Employers' Liability Act was not applicable to the case. An employee of defendant was killed while engaged in unloading a steamship engaged solely in interstate commerce, while it was docked at a pier in this state. The court held specifically that the work in which decedent was engaged was "longshore work" as classified in group 10 of section 2 of the Workmen's Compensation Law and did not fall within group 8, which excepts injuries received in the operation and repair of "vessels of other states or countries used in interstate or foreign commerce when operated or repaired by the company."

The Commission had previously made an award which was affirmed without opinion in the Appellate Division (167 App. Div. 945). The act was held to be not violative of the due process clause or of the commerce clause of the Federal constitution. The Federal Employers' Liability Act was held not to apply since, so far as this case was concerned, the defendant was a carrier by water while the Federal Act applies only to transportation by railroad. It was likewise held that the employee is not deprived of a remedy for injuries occasioned by the negligence of his employer, since the compensation act is a valid substitute for the former common law right of action.

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\* On March 7, 1917, the Supreme Court upheld the compensation laws of these three states.

The enactment in 1913 of section 19 of article 1 of the state constitution removed the objections to a compensation statute so far as the state constitution is concerned. The present statute was distinguished by the Court of Appeals from the compensation law enacted in 1910, which was held to be violative of the due process clause of the Federal constitution as well as of the State constitution, in the case of *Ives v. South Buffalo Ry. Co.* (215 N. Y. 271),\* on the ground that the 1914 statute provides a method, through the state insurance fund or alternative plans, of distributing the burden of compensation equitably over the industries affected, whereas the 1910 statute subjected the individual employer to a suit for damages. In view, both of these differences and also of the decision of the United States Supreme Court in the case of *Noble State Bank v. Haskell* (219 U. S. 104), the Court of Appeals held that the conflict with the Federal constitution no longer exists.

MILLER, J.: The claimant's husband was killed on August 15th, 1914, while employed in unloading the steamship *El Oriente* which was berthed alongside a pier in the Hudson river. When the accident occurred he was moving an electric truck upon a gangway connecting the vessel with the pier. The appellant, a corporation of the state of Kentucky, is a common carrier by railroad. It also owned and operated said steamship, which plied between New York and Galveston, Texas. It does not appear that the steamship was in any way operated in connection with a line of railroad, and in its report of the accident the appellant stated its business to be "transportation by steamships engaged solely in interstate commerce." We are required on this appeal, first, to construe the Workmen's Compensation Law (Chap. 67 of the Consolidated Laws; L. 1914, ch. 41) in so far as it relates to this case, and, second, to determine its constitutional validity. The scheme of the statute is essentially and fundamentally one by the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments. The state fund is created from premiums paid by employers based on the payroll, the number of employees and the hazards of the employment. The employer has the option of insuring with any stock corporation or mutual association authorized to transact such business, or of furnishing satisfactory proof to the commission of his own financial ability to pay. If he does neither he is liable to a penalty equal to the *pro rata* premium payable to the state fund during the period of his non-compliance and is subject to a suit for damages by the injured employee, or his legal representative in case of death, in which he is deprived of the defenses of contributory negligence, assumed

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\* Full text of the decision appeared in the Quarterly Bulletin of the Department of Labor, No. 46, March, 1911, pp. 59-80.

risk and negligence of a fellow-servant. By insuring in the state fund, or by himself or his insurance carrier paying the prescribed compensation, the employer is relieved from further liability for personal injuries or death sustained by employees. Compensation is to be made without regard to fault as a cause of the injury, except where it is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another or results solely from his intoxication while on duty. Compensation is not based on the rule of damages applied in negligence suits but in addition to providing for medical, surgical or other attendance or treatment and funeral expenses it is based solely on loss of earning power. Thus the risk of accidental injuries occurring with or without fault on the part either of employee or employer is shared by both and the burden of making compensation is distributed over all the enumerated hazardous employments in proportion to the risks involved. So much for the general outline of the scheme against whose justice or economic soundness nothing, that occurs to me, can be said.

The particular provisions requiring construction are the following:

"Section 2. *Application.* Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments: . . .

"Group 8. The operation, within or without the state, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company. . . .

"Group 10. Longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage."

"Section 114. *Interstate Commerce.* The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

It is claimed that loading and unloading are included in "operation" and that, therefore, the case falls within group 8, which excepts vessels of other states or countries used in interstate or foreign commerce, but the specific enumeration of longshore work in group 10 excludes such work from the other group.

It is next claimed that the statute was not intended to apply to employment in interstate or foreign commerce and that in case of doubt that construction should be adopted, for otherwise it would offend against the commerce clause of the Federal Constitution by imposing a burden upon such commerce. The latter claim will be noticed first. The statute does not purport directly to regulate or impose a burden upon commerce, but merely undertakes to regulate the relations between employers and employees in this state. Such regulation may, and no doubt does, indirectly affect commerce, but to the extent that it may affect interstate or foreign commerce it is plainly within the jurisdiction of the state, until congress by entering the field excludes state action. (*Sherlock v. Alling*, 93 U. S. 99; *Morgan's Steamship Co. v. Louisiana*, 118 U. S. 455; *Reid v. Colorado*, 187 U. S. 137; *Simpson v. Shepard*, 230 U. S. 352; *Erie R. R. Co. v. Williams*, 233 U. S. 685.)

Literally construed, section 114 makes the statute apply only to intrastate work, either done by itself or in connection with, but clearly separable and distinguishable from, interstate or foreign commerce. But, though the section is awkwardly phrased, it is manifest that a broader application was intended, else the clause "for whom a rule of liability or method of compensation has been or may be established by the congress of the United States" is meaningless. The legislature evidently intended to regulate, as far as it had the power, all employments within the state of the kinds enumerated. The earlier sections are in terms of general application, and section 114, which is headed "Interstate Commerce," is one of limitation, not of definition. Its obvious purpose was to guard against a construction violative of the Constitution of the United States, and so it provided that the act should apply to interstate or foreign commerce, "for whom a rule of liability or method of compensation has been or may be established by the congress of the United States," only to the extent that intrastate work affected may or shall be clearly separable or distinguishable therefrom. In other words, the legislature said that it did not intend to enter any field from which it had been or should be excluded by the action of the congress of the United States. But it is said that congress may at any time regulate employments in interstate or foreign commerce, and that the case is one in which a rule "may be established," etc. Again, the spirit, not the letter, must control. If it had been intended to confine the application of the act to intrastate work, the legislature would doubtless have said so in a sentence. The words "may be" should be construed in the sense of "shall be."

One other question in respect of the application of the act remains to be considered. It is said that the appellant is a carrier by railroad, and that, therefore, the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65), prescribes the rule governing the employment in which the deceased was engaged. As far as this case is concerned the appellant is a carrier by water. Its business is transportation by steamships, which, as far as appears, may not even indirectly be related to transportation by railroad, certainly not by any particular line of railroad. It is significant that the earlier Federal statute of June 11, 1906 (34 Stat. L. 232), applied to "every common carrier" engaged in interstate or foreign commerce, whilst the present act applies only to carriers by railroad. There is nothing in the act indicative of a purpose to apply it to carriage by water, if it happen to be conducted by a railroad corporation, and not otherwise — to apply one rule of liability to transportation by a steamship line, if owned and operated by a railroad corporation, and a different rule to precisely similar transportation not thus controlled. The Federal act provides a rule of liability of carriers by railroad for injury or death "resulting in whole or in part \* \* \* by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." The words "boats" and "wharves" may be given due effect by applying them to adjuncts or auxiliaries to transportation by railroad.

Our conclusion, therefore, is that the employment in which the deceased was engaged was not governed by the Federal statute, that the Workmen's Compensation Act applied to it, and that the latter act is not violative of the Federal Constitution for attempting directly to regulate or impose a



tax or burden on interstate or foreign commerce. We now come to perhaps the most important question in the case. Does the act violate the Fourteenth Amendment to the Constitution of the United States for taking property without due process of law?

Much reliance is placed on the decision of this court in *Ives v. South Buffalo Ry. Co.* (201 N. Y. 271, 294). In that case Judge WERNER, referring to the appeal on economic and sociologic grounds and speaking for the court, said: "We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment, but we think it is an appeal which must be made to the people and not to the courts." That decision was made in March, 1911. Following that suggestion, the legislature provided in the orderly way prescribed by the Constitution for the submission to the people of a proposed constitutional amendment and in due time that amendment was adopted on November 4th, 1913, and became section 19 of article 1 of our State Constitution. It is unnecessary to set that amendment forth *in extenso*, but it suffices to say that so far as the due process clause or any other provision of our State Constitution is concerned the amendment amply sustains the act. However, it is urged that the reasons which constrained the court to declare the act involved in the *Ives* case unconstitutional are equally cogent when applied to the Fourteenth Amendment. In the first place it is to be observed that the two acts are essentially and fundamentally different. That involved in the *Ives* case made the employer liable in a suit for damages though without even imputable fault and regardless of the fault of the injured employee short of serious and willful misconduct. This act protects both employer and employee, the former from wasteful suits and extravagant verdicts, the latter from the expense, uncertainties and delays of litigation in all cases and from the certainty of defeat if unable to establish a case of actionable negligence. Both acts are said to have been based on the proposition that the risk of accidental injuries in a hazardous employment should be borne by the business and that loss should not fall on the injured employee and his dependents, who are unable to bear it or to protect themselves against it. That act made no attempt to distribute the burden, but subjected the employer to a suit for damages. This act does in fact as well as in theory distribute the burden equitably over the industries affected. It allows compensation only for loss of earning power, but by the creation of a state insurance fund, or by the substitute methods provided, it insures the prompt receipt by the injured employee or his dependents of a certain sum undiminished by the expenses of litigation. The two acts are, therefore, so plainly dissimilar that the decision in the *Ives* case is not controlling in this.

Moreover, upon the question whether an act offends against the Constitution of the United States the decisions of the United States Supreme Court are controlling. The only one of the numerous Workmen's Compensation Acts which appears to have been directly passed on by the United States Supreme Court is the act of Ohio, which contained an optional clause. (*Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571.) The single question decided in that case was that limiting the application of the act to shops with five or more employees did not result in arbitrary and unreasonable classification. This act is compulsory. The employer is subjected to a penalty for not

adopting one of the three methods of insurance allowed him, and the employee has no choice at all except possibly as to whether he will enter one of the classified employments. However, except for a feature presently to be considered, the decision in *Noble State Bank v. Haskell* (219 U. S. 104) is decisive. Indeed, upon close analysis it will appear that the taking justified in that case as a proper exercise of the police power was no more in the public interest than that involved in this case and that the mutual benefits to the parties immediately concerned were not as direct. In that case an act of the state of Oklahoma requiring every bank existing under the state laws to pay an assessment based on average daily deposits into a guaranty fund to secure the full repayment of deposits in case any such bank became insolvent was sustained not merely under the reserve power of the state to alter or repeal charters but as a proper exercise of the police power. Solvent banks were thus required to pay money into a fund for the direct benefit of others, the banks benefiting only indirectly from the supposed benefit to commerce and the greater stability of banking. In this case the mutual benefits are direct. Granted, that employers are compelled to insure and that there is in that sense a taking. They insure themselves and their employees from loss, not others. The payment of the required premiums exempts them from further liability. The theoretical taking no doubt disappears in practical experience. As a matter of fact every industrial concern, except the very large ones who insure themselves, have for some time been forced by conditions, not by law, to carry accident indemnity insurance. A relatively small part of the sums thus paid actually reached injured workmen or their dependents. With the economic saving of the present scheme, insurance in the long run should certainly be as cheap as under the old wasteful plan, and the families of all injured workmen, not a part only, will receive some compensation for the loss of earning power of the wage earner. We should consider practical experience as well as theory in deciding whether a given plan in fact constitutes a taking of property in violation of the Constitution. A compulsory scheme of insurance to secure injured workmen in hazardous employments and their dependents from becoming objects of charity certainly promotes the public welfare as directly as does an insurance of bank depositors from loss.

But for the matter now to be considered we need not look farther for a case controlling upon us and in principle decisive of this. Whilst the *Noble State Bank* case was referred to in the *Ives* case, it was not controlling for the reason that the State Constitution was involved and it was not in point as an authority because of the essential differences in the act then before the court, already pointed out.

A point was made on oral argument that the act was unconstitutional for depriving an employee injured by negligence imputable to the employer of a right of action for the wrong. Of course, the employer cannot be heard to urge the grievance of the employee (*Jeffrey Mfg. Co. v. Blagg, supra*), but exemption from further liability upon paying the required premium into the state fund is an essential element of the scheme, and if the act be unconstitutional as to the employee the employer would be deprived of that exemption and thus would be directly affected by the unconstitutionality of the act in that respect. It is not accurate to say that the employee is

deprived of all remedy for a wrongful injury. He is given a remedy. To be sure, the compensation or recovery is limited, and that in a sense may possibly constitute a taking; but if so, it is his contribution to an insurance scheme designed for his benefit, and may be justified on precisely the same grounds as the contribution exacted of the employer has been. When he enters into the contract of employment, he is now assured of a definite compensation for an accidental injury occurring with or without fault imputable to the employer and is afforded a remedy, which is prompt, certain and inexpensive. In return for those benefits he is required to give up the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all after long delay, must go to pay expenses and lawyers' fees.

Moreover, the act does not deal with intentional wrongs but only with accidental injuries, and no account is taken of the presence or absence of negligence attributable to the employer. In the way modern undertakings are conducted it is rarely possible to trace personal fault to the employer, but he has been held liable for wrongs of others under the doctrine of *respondent superior*. That doctrine has been developed by the courts to make the principal accountable for the conduct of his affairs, though it must be remembered that it does not rest on the doctrine of agency. No one has a vested right under the Constitution to the maintenance of that common-law doctrine, which undoubtedly may be extended or curtailed by the legislature. No one doubts that the doctrine of assumption of risk and the fellow-servant doctrine, also developed by the courts under different conditions than those now prevailing, may be limited or entirely abrogated by the legislature. Acts having that effect have been sustained by repeated decisions of this court. The power to limit or take away must also involve the power to extend. At the common law the servant was held to assume by implied contract the ordinary risks of the employment, including the risk of a fellow-servant's negligence, and even of negligence imputable to the master if the danger was obvious, or with knowledge of it the servant voluntarily continued in the employment. It would not be a great extension of that doctrine for the legislature to provide that the employee should assume the risk of all accidental injuries, and if that can be done, it is certainly competent for the legislature to provide by the creation of an insurance fund for a limited compensation to the employee for all accidental injuries, regardless of whether there was a cause of action for them at common law.

This subject should be viewed in the light of modern conditions, not those under which the common-law doctrines were developed. With the change in industrial conditions, an opinion has gradually developed, which almost universally favors a more just and economical system of providing compensation for accidental injuries to employees as a substitute for wasteful and protracted damage suits, usually unjust in their results either to the employer or the employee, and sometimes to both. Surely it is competent for the state in the promotion of the general welfare to require both employer and employee to yield something toward the establishment of a principle and plan of compensation for their mutual protection and advantage. Any plan devised by the wit of man may in exceptional cases work unjustly, but the act is to be judged by its general plan and scope and the general good to be promoted by it. Fortunately the courts have not attempted to define the limits

of the police power. Its elasticity makes progress possible under a written constitution guaranteeing individual rights. The question is often one of degree. The act now before us seems to be fundamentally fair to both employer and employee. Of course, I do not speak of details, which may or may not be open to criticism, but which, granting the validity of the underlying principle, are plainly within the province of the legislature. It is not open to the objections found to be fatal to the act considered in the *Ives* case. It is plainly justified by the amendment to our own State Constitution and the decisions of the United States Supreme Court, notably in the *Noble State Bank* case, make it reasonably certain that it will be found by that court not to be violative of the Constitution of the United States.

The order of the Appellate Division should be affirmed, with costs.

WILLARD BARTLETT, Ch. J., COLLIN, CUDDERBACK, CARDOSO and SEABURY, JJ., concur; WERNER, J., not sitting. Order affirmed. *Jensen v. Southern Pacific Co.*, 215 N. Y. 514, July 13, 1915.

A case similar to the above was decided at the same time by the Court of Appeals. An award had been made by the Commission and affirmed, without opinion, by the Appellate Division (167 App. Div. 945). The award was affirmed by the Court of Appeals without opinion on the authority of the *Jensen* case noted above. The summary of objections raised by the defendant is as follows:

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered March 22, 1915, which affirmed an award of the State Workmen's Compensation Commission.

At the hearing objection was made to the making of an award on the ground that the act does not apply because the injured man was engaged in interstate commerce in the employ of a foreign corporation of the state of Kentucky which was engaged solely in interstate commerce; the injury was one with respect to which Congress may establish and by the Federal Employers' Liability Act has established a rule of liability, and under the language of section 114 of the State Workmen's Compensation Law that act has no application; on the ground that the act includes only those engaged in the operation of vessels other than those of other states and countries in foreign and interstate commerce, while Burns was engaged in operation of a vessel of another state engaged in interstate commerce and hence does not come within the provisions of the act; further, that the act is unconstitutional in that it constitutes a regulation of commerce among the several states in violation of article 1, section 8, of the Constitution of the United States; in that it takes property without due process of law in violation of the Fourteenth Amendment of the Constitution; in that it denies the Southern Pacific Company the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution, because the act does not afford an exclusive remedy; also, that the act is unconstitutional in that it violates article 3, section 2, of the Constitution. *Burns v. Southern Pacific Co.*, 215 N. Y. Rep. 120, July 13, 1915.

The relation between the Compensation Law and the Admiralty Law has also been decided by the Court of Appeals. An employee was injured on a steamship, engaged solely in interstate commerce, at its pier in the Hudson River. The Commission made an award which was affirmed in the Appellate Division (167 A. D. 945) without opinion. It was argued that since the Compensation Law cannot be made an *exclusive* remedy for employees injured while upon navigable waters, it was inapplicable to such employees at all. The Court of Appeals in affirming the award held that the Compensation Law has replaced the common law as a remedy for injuries arising in the employments to which the Compensation Law applies. This applies, of course, not merely to common law actions proper but to the right of action under employers' liability laws as well. Whereas formerly the employee in a case like the present one had the choice of an action under the common law or of a proceeding in admiralty, he now has the option of making a claim under the Compensation Law or of an admiralty proceeding. Both remedies exist concurrently.

MILLER, J.: This case involves a point not considered in *Matter of Jensen*, decided herewith. The claimant was injured on a steamship lying alongside a pier in the Hudson river, and the case was, therefore, one of admiralty and maritime jurisdiction. It is urged that the Workmen's Compensation Act was not intended to apply to such a case, and that if it was it is unconstitutional for denying the equal protection of the laws.

Article 3, section 2 of the Constitution of the United States provides: "The judicial power shall extend \* \* \* to all cases of admiralty and maritime jurisdiction."

The Judicial Code of the United States of March 3d, 1911 (C. 231, amending 36 Stat. 1087) provides: "Section 24. The district courts shall have original jurisdiction as follows: \* \* \* Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." "Section 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states; \* \* \* Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

Whilst Congress has conferred admiralty jurisdiction upon the District Courts, that jurisdiction is derived from the Constitution of the United States and is governed by the rules of the maritime law. Congress has not established "a rule of liability or method of compensation" within the meaning of section 114 of the Workmen's Compensation Act set forth in the opinion in the *Jensen* case. The act, therefore, applies unless the admiralty

jurisdiction is exclusive. But the sections of the Judicial Code above quoted like the provisions of the Judiciary Act from which it was compiled saves to suitors common-law remedies. The jurisdiction peculiar to admiralty, which cannot be exercised by state courts, is the jurisdiction to enforce maritime liens by proceedings *in rem*. A suitor must pursue that remedy in the District Court of the United States, but he may if he choose resort to his common law remedy by action against the master or owner of the vessel in any court, state or federal, having jurisdiction. (*The Moses Taylor*, 4 Wall. 411; *The Hine v. Trevor*, Id. 555; *The Belfast*, 7 id. 624; *Steamboat Co. v. Chase*, 16 id. 522; *The Lottawanna*, 21 id. 558; *The Glide*, 167 U. S. 606.) The remedy provided by the Workmen's Compensation Act is a substitute for the common-law remedy. It is in no sense a proceeding *in rem* to enforce a maritime lien and may, therefore, exist concurrently with the remedy in admiralty. The State cannot interfere with the admiralty jurisdiction (*The Lottawanna*, *supra*; *Workman v. New York City*, 179 U. S. 552), and if the act be valid, an injured employee may in certain cases have a choice of remedies, one under the act and another in admiralty precisely as before he could choose between his common-law remedy and the right to proceed in admiralty.

But it is argued that the act purports to grant exemption from further liability to those who comply with it, and that as such exemption is not effectual in the case of employers whose property may be proceeded against in admiralty, it is as to them a denial of the equal protection of the laws. The exemption, however, is from suits at common law, of which all employers complying with the act equally have the benefit. If another remedy remain, it results from the nature of the case, and not from any attempt at discrimination on the part of the legislature. All in the same case are treated alike. Employers in the situation of the appellant are subjected to two remedies now, precisely as they were before the passage of the act. A new remedy has been substituted for the common-law remedy, from which the employer is granted exemption.

The case of *Cunningham v. Northwestern Improvement Co.* (44 Mont. 180), relied on by the appellant is not in point. The statute considered in that case required the employers to make the prescribed payments into the state fund but left them liable to a suit at common law. The legislature in this case granted as far as it had the power exemption from further liability upon compliance with the act, thus treating all alike. If in certain cases a remedy in admiralty still exists, that results from the dual nature of our government—from the existence of two jurisdictions within the same territorial limits—and is a part of the price which persons thus affected have to pay for the privilege of enjoying the advantages of that form of government.

The order should be affirmed, with costs.

WILLARD BARTLETT, Ch. J., WERNER, COLLIN, CUDDERBACK, CARDOZO and SEABURY, JJ., concur. Order affirmed. *Walker v. Clyde S. S. Co.*, 215 N. Y. 529, July 13, 1915.

The constitutionality of sections 21 and 68 of the Workmen's Compensation Law has been upheld in *McQueeney v. Sutphen &*

*Myer*, 167 App. Div. 528, the full text of which is given below, pp. 392-394. Relative to the constitutionality of these sections the court said:

"The appellants contend that it does not appear that the claimant was engaged in one of the hazardous employments defined by section 2 of the law; that it does not appear that the glass which the claimant was handling was being made into looking glasses or bevelled glass plates or even was to be cut into small-sized plates; that for all that appears he may have been packing glass which had been sold to a customer in the same condition it was in when received at the shop.

"This contention overlooks the provision of section 21 that in any proceeding for the enforcement of a claim it shall be presumed, in the absence of substantial evidence to the contrary, '1. That the claim comes within the provisions of this chapter.' The presumption in itself is not unreasonable. Under the act the claimant, within ten days after the injury, must notify the Commission and the employer of the accident (§ 18); the employer, within ten days after the accident, must report it to the Commission, giving the nature and the cause of the injury (§ 111); any time after fourteen days the claim may be filed; thereupon the Commission investigates the claim in its own way, and if required by either party gives a hearing (§ 20). We quote from section 68: 'The Commission \* \* \* shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties.' Some of the provisions are quite unusual, and if they related to ordinary actions or proceedings in court, might with some reason be claimed to infringe upon the constitutional rights of the parties. But section 19 of article 1 of the Constitution authorizes the law and its unusual provisions. Among other things, it provides that nothing in the Constitution shall be construed as limiting the power of the Legislature to enact laws for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation. The fact, therefore, that the practice is unusual is no objection to it, as the Constitution authorizes the Legislature to create this new remedy and the practice to enforce it."

"The Legislature may from time to time change the rules of evidence and procedure, and a party's constitutional rights ordinarily are not affected thereby. It may cast the burden of proof upon any party, and may make certain acts *prima facie* evidence of facts if the acts by any reasonable intentment bear upon or tend to establish the facts. The rule of presumption and the provisions of the act do not, therefore, infringe upon the due process of law guaranteed by the Constitution. (*People v. Johnson*, 185 N. Y. 219.)"

In an injured employee's action for damages against his employer who had fully complied with the Workmen's Compensation Act, Justice Crane of the Supreme Court overruled a

demurrer that the compensation statute could not deprive injured employees of the right to resort to the courts for damages. While thus declining, as a trial term judge, to interfere with an act of the Legislature, Justice Crane in a lengthy opinion upheld the proposition that the compensation law cannot be compulsory upon employees without being unconstitutional. The opinion in full is as follows:

CRANE, J.: The demurrer in this case raises the question whether an employee may bring an action to recover damages for injuries or is completely barred by the Workmen's Compensation Act (Laws of 1913, chap. 816, re-enacted and amd. by Laws of 1914, chap. 41). This action is brought to recover damages for personal injury received by the plaintiff in December of 1914 while working for the defendant in its factory. Liability is claimed under the common law. The answer has pleaded as a separate and complete defense that the defendant has complied with the provisions of the Workmen's Compensation Act and is relieved from all liability except as therein stated. To this defense the plaintiff has demurred. Her claim is that the Workmen's Compensation Act cannot deprive her of the right to resort to the courts for damages if she so desires.

At the outset it is well to state that the act is legal as to all who act under it. Very few will be foolish enough, even if allowed, to bring a lawsuit for damages and run the risk and uncertainties of recovery when the allowances made by the statute may always be accepted.

It was decided in the case of *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, that the Workmen's Compensation Law passed in 1910, which compelled the employer when not at fault to pay his servant a fixed compensation for an injury received, violated both state and federal Constitutions as taking property without due process of law, and was not within the police power of the state. The case of *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, subsequently decided, differed with our Court of Appeals and held just the other way. The subsequent amendment to our Constitution (art. 1, § 19) cannot therefore authorize the state legislature to pass a compensation law compulsory as to the employer, because the state Constitution can no more violate the federal Constitution than can the act of the legislature, and for this purpose both are upon an equality. The present law may, however, be considered as optional with the employer.

By section 11 an "alternative remedy" is provided in case the employer does not comply with the act. He may be sued by the employee in an action for damages and the defenses of contributory negligence, negligence of a fellow servant and assumption of risk are taken away. That part which provides that if the employer does not insure the servant may sue him in the courts not only for damages, but may elect to claim the compensation provided by the act, must be held to apply to such claims only as can be maintained at common law or under other statutes. While section 50 provides that if an employer fail to secure compensation to his employee as fixed, he shall be liable to a penalty for every day during which such failure continues of one dollar for every employee, to be recovered in an action brought by



the commission, this feature can be eliminated under section 118 without invalidating the act.\* But I cannot decide these points as the employer does not raise them and it has been frequently held that only those whose rights are directly affected can properly question the constitutionality of a state statute. *Hendrick v. State of Maryland*, 235 U. S. 610.

If, under the *Ives* case, the Workmen's Compensation Act cannot be compulsory as to the employer, can it be compulsory as to the employee? If a compulsory act takes the property of an employer in violation of the Fourteenth Amendment, does a compulsory act also deprive the employee of property or liberty without due process of law? In this connection it will be noted that many of the states have now adopted Workmen's Compensation Acts and that nearly all of them, unlike the New York statute, are elective both as to the employer and employee; that is, the employer and employee have the right to choose whether they will come under the act, and it is made applicable to them only by their agreement, express or implied. In none of these states has fixed compensation been forced upon the employer or employee, and yet both have recognized the material benefit to be derived from such an act and have almost universally agreed to be governed by it. See Bradbury's Workmen's Compensation, vol. 1, chap. 1. By the New Jersey act the employment is presumed to be under the Workmen's Compensation Law unless the master or the servant give notice the one to the other that he elects to be governed by the common law. *Sexton v. Newark District Telegraph Co.*, 86 Atl. Rep. 451; *Troth v. Millville Bottle Works*, 91 id. 1031; for the Massachusetts statute and the rulings under it, see *Young v. Duncan*, 218 Mass. 346; *Opinion of Justices*, 209 Mass. 607; for the Wisconsin statute, *Borgnis v. Falk Co.*, 147 Wis. 327; as to the Ohio statute see *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349; *Joffrey Mfg. Co. v. Blogg*, 235 U. S. 571.

In these cases which have just been cited it was specially noted that they did not violate the principles of the *Ives* case in that an election was given to both the employer and employee, and that their action thereunder was voluntary.

So we come to the question whether an employee may be compelled to accept a certain sum of money by a legislative fiat for an injury done to him through negligence. Can the legislature take away altogether the right to recover damages which a person sustains by reason of the failure of another individual to exercise reasonable care? Can the state deprive its citizens of all remedy for negligence? Negligence is the failure to act in a given society according to common standards, and liability for negligence is the governmental force used to keep society together, thus requiring persons to respect the safety of all other persons. A man has a right under well organized government to be protected from the carelessness and negligence of others. A failure to exercise the ordinary care used in a given society resulting in an injury is a violation of the inherent rights of the injured member of that society. It will be conceded upon the mere statement that the legislature cannot take away all remedy for injurious trespass upon property. That is, a law which should provide that no action could be maintained in the courts of the state for an injury done to real prop-

\* L. 1914, ch. 316, has amended § 50 by substituting for the daily fine of one dollar an amount equal to the pro rata premium for the period of noncompliance. L. 1916, ch. 622, has amended § 52, to make failure to secure the payment of compensation a misdemeanor.

erty would violate the Fourteenth Amendment. Would not a law likewise be unconstitutional which should provide that no cause of action could be maintained thereafter to recover the damages inflicted by an assault, or by a libel destroying reputation, or through malicious prosecution or by false arrest? All these matters pertain to a man's security of person and enjoyment of his liberty, and for the legislature to take away all remedy for such wrongs is the same as legislating that such wrongs may be committed. "We are unable to perceive the difference in principle between the act seeking to divest them (rights) directly and one providing that, where they have been divested by unlawful violence, no remedy shall be had against the wrongdoer." *Johnson v. Jones*, 44 Ill. 142, 163.

To permit others to libel, assault or falsely arrest an individual without providing a remedy for such acts is to deprive a man of his life and of his liberty as those words have been construed. Likewise, it deprives a man of his life and his liberty within the meaning of the Constitution to permit others to negligently injure him and provide no remedy. Cooley on Constitutional Limitations (5th ed., p. 445) says that under the Fourteenth Amendment every man is entitled to a certain remedy in the law for all wrongs against his person. *MacMullen v. City of Middletown*, 112 App. Div. 819, held that a man had a vested right to be secured from wrongful injury to his person, and that the legislature could not deprive him of all remedy for the wrong. This case was reversed in 187 New York, 37, in so far as the rule was applied to municipal corporations as they were part of the machinery of government and the legislature in granting to them charters could restrict or take away liability for negligence. There was, however, no repudiation of the rule as applied to other parties. See also the opinion in *Williams v. Village of Port Chester*, 72 App. Div. 505, where this right to a remedy for a wrong resulting from negligence is fully and completely stated; S. C., 97 App. Div. 84; *affd.*, 183 N. Y. 550; *Barry v. Village of Port Jervis*, 64 App. Div. 268; *Bertholf v. O'Reilly*, 74 N. Y. 509; *Levy v. Dunn*, 160 id. 504. In *Post Publishing Co. v. Butler*, 137 Fed. Repr. 723, a statute which limited the damages to be recovered in libel actions where a retraction had been made was held to be in violation of the state Constitution, but the provisions of the state Constitution were similar in effect to the provisions of the Fourteenth Amendment of the federal Constitution. See also *Osborn v. Leach*, 86 L. R. A. 648. Here it was said: "There is no room for holding, in a constitutional system, that private reputation is any more subject to be removed by statute from full legal protection than life, liberty or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization."

The same words are as applicable to protection from another's gross negligence or assault.

The case of *Munn v. Illinois*, 94 U. S. 113, quoted in *Second Employers' Liability Cases*, 223 U. S. 1, says: "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitations." This certainly does not mean that any and every rule of the

common law can be changed at the whim of the legislature, for it distinctly says that rights of property which have been created by the common law cannot be taken away without due process. But rights to life and liberty are equally protected by the Constitution, and these rights are but a rule of the common law, or have found their expression in the common law as fundamental principles of government. The right to keep one's person free from unlawful assault or arrest is as sacred as the right to keep one's property from an unlawful taking. These words of Chief Justice Waite were used in explaining the force and effect of the police power which, of course, justified in one sense the taking of property without judicial action. That the justice had such limitation in mind in the use of his words is also evident from the fact that he said that the law itself as a rule of conduct could be changed at the will of the legislature "unless prevented by constitutional limitations." It is the constitutional limitation of the Fourteenth Amendment which is here insisted upon and which prevents the legislature from taking away all cause of action for the above enumerated wrongs to the person. The legislature may change the remedy, shift the burden of proof, raise presumptions and modify rules of evidence, but it cannot take away altogether the cause of action for personal negligence resulting in personal injury.

If the legislature, therefore, cannot take away the cause of action for assault, libel or for negligence, except where it has created such cause of action, can it limit the damages to be recovered therein by a schedule of prices? It is evident that it could not limit the damage to be recovered for injury to real or personal property, as this would be clearly taking property without due process. Likewise it cannot limit a recovery for actual damage sustained through assault, libel or negligence, for this would be in effect depriving a person of life and liberty. If it can arbitrarily fix the amount, it can fix it so low or so high as to be a deprivation of all protection and of all personal or property rights. This act must be considered in the light of what may be done under the power exercised and not what will be done.

I am strongly of the opinion, for the reasons stated, that the Workmen's Compensation Act cannot be forced upon employees any more than upon employers; that if there cannot be a compulsory act for the master, neither can there be a compulsory act for the servant; if the employer may elect whether he will come in under the Workmen's Compensation Act or stand by his common law liability, so can the employee. It must be by mutual consent or the law is of no force.

As I have above stated, all the Workmen's Compensation Acts of the various states, with one or two exceptions, are based upon this voluntary action upon the part of the employer and the employee. These enactments or laws provide a rule of presumption, that is, the act of hiring is presumed to be under the compensation act unless a notice *provided by the law* is given to the contrary. This is very simple, has worked well and has obviated all constitutional objections. It is a very easy matter for the New York state legislature to so modify this law, for under the present enactment (Laws of 1914, chap. 41) the employee is given no choice or election. If the employer chooses to come under the Compensation Act the employee is bound to and is barred from all other remedy.

The plaintiff in this case is an infant and a question may arise as to the power of an infant to elect his remedies. *Murphy v. Village of Fort Edward*,

213 N. Y. 403. The legislature, however, may remove the disability of infancy so as to permit an infant old enough to go to work under our labor statutes to make an election as to whether he will work under the compensation law or the common law. *Dickens v. Carr*, 84 Mo. 658. By the New Jersey act the infant may exercise the option through his guardian. See *Seaton Case, supra*. In the *Borgnis Case, supra*, it was said: "There is no claim that the legislature may not endow minors with the right to make contracts otherwise lawful."

While I have thus frankly stated my views, I must not overlook the serious consequences which may follow from the Trial Term court interfering with this act of the legislature. If the plaintiff were the only one interested I should have no hesitancy in deciding that she might maintain this action, but she is not the only one interested. This act gives to all injured employees, irrespective of contributory negligence or their ability to maintain a common law action, certain definite sums of money when injured. Notice, however, must be given by the employee within the time prescribed by the act and other formalities complied with. Through a desire for more money or the persuasions of lawyers many injured employees, in reliance upon my decision, might be inclined to forego the compensation given by the statute and resort to an action for negligence. The Court of Appeals might subsequently determine that in this manner I was in error, or that in the light of subsequent decisions (*Second Employers' Liability Cases*, 223 U. S. 1) the *Ives* case should be modified in its limitations of the police power. In such a case the result would be that all such employees would have lost forever all rights under the Compensation Act and also would be barred from an action for damages. In other words, all their rights might be made to depend upon the correctness of the view of one judge. Such widespread consequences create a situation where the Trial Term should not declare a legislative act inoperative even though the judge were of such an opinion. I have examined all of the points which have been raised by the briefs; I have given my opinion of them as above stated, but for reasons that work, in my judgment, for the proper and orderly administration of justice in the courts, I must overrule the demurrer and hold that the plaintiff cannot maintain this action, at least until a court of final authority passes upon the question. Demurrer overruled. *Herkey v. Agar Manufacturing Co.*, 90 Misc. 457, May, 1915.

A decision bearing upon the Compensation Law enacted in 1910 may be of interest. It will be recalled that this statute, after having been upheld in the Supreme Court and also in the Appellate Division, was, in March, 1911, declared unconstitutional by the Court of Appeals. The Appellate Division, First Department, has since held that premiums due under a liability policy, issued prior to the date when the statute was held to be unconstitutional and also expiring prior to that date, may be collected. The fact that the statute was afterward held to be unconstitutional did not destroy the risk which existed while the act was in force. The opinion is as follows:

HOTCHKISS, J.: On January 29, 1910, the plaintiff issued to the defendant, as receiver of the Ferguson Contracting Company, its policy of liability insurance, whereby it agreed to indemnify the defendant against loss from liability imposed by law upon him for damages on account of bodily injuries accidentally suffered or alleged so to have been while that policy was in force, including death, by any employee of the defendant while working at any place as described in the policy. The premium was based on the entire compensation paid to the defendant's employees as the same should be ascertained in the manner provided for in the contract. This policy ran for one year from its date. On August 31, 1910, by a rider attached to the policy and in consideration of an additional premium, the risks covered by the policy were extended from and after the date last mentioned to the end of the insured period, so as to cover the liability of the assured under chapter 674 of the Laws of 1910,\* known as the "Workmen's Compensation Law." The total amount of the premium for the additional risk covered by the rider for the unexpired time covered by the policy amounted to \$704, no part of which has been paid. In the case of *Ives v. South Buffalo R. Co.* (201 N. Y. 271) the Court of Appeals, on March 24, 1911, declared the Workmen's Compensation Law to be unconstitutional. This decision reversed the decision in the same case theretofore made by the Appellate Division of this court in the Fourth Department (140 App. Div. 921), which latter decision until its reversal was the accepted law of the State. It will be noticed, however, that the period covered by the policy had expired some time before the decision of the Court of Appeals was rendered. The question submitted for our determination is whether the plaintiff is entitled to recover the amount of its said premium together with interest, amounting in the aggregate to \$851.23, or whether defendant is under no liability to pay said premium or any part thereof because, as he contends, the act being unconstitutional, there was in fact no liability to insure against and the contract of insurance was without consideration.

I think the defendant has misapprehended the meaning of the term "risk" upon which the question at issue depends. If property insured against fire turns out to have been destroyed before or to have had no existence at the time the policy was written, clearly no risk ever attached, and the insurer could not claim to have given any consideration for the premium reserved. But here the risk insured against attached at the time the policy was issued and continued until the policy expired, because during all of that period the defendant rested under the possibility of being cast in damages in the event that accidents such as those insured against had happened. The fact that thereafter the act was held to be void did not destroy the risk — *qua* risk — which existed while the act was in force. It would seem, however, as if all doubt was removed by the agreement of the parties themselves, for the rider provided "The actual wages and earned premium shall be determined in the manner set forth in the Policy to which this indorsement is attached, and it is agreed that such earned premium shall be retained by the Company regardless of the construction which may be given by the courts to the law referred to herein," being the act in question.

There should be judgment for the plaintiff for \$851.23, with costs.

INGRAHAM, P. J., McLAUGHLIN, LAUGHLIN and DOWLING, JJ., concurred.

\*Adding to Labor Law (Consol. Laws, chap. 81; Laws of 1909, chap. 86), art. 14a — Rep.

Judgment for plaintiff, with costs, as stated in opinion. Ordered to be settled on notice. *New Amsterdam Casualty Co. v. Olcott*, 165 App. Div. 603, December 31, 1914.

The decision of the Court of Appeals in *Shanahan v. Monarch Engineering Co.*, below, p. 321, though not settling a question of constitutionality, is of the highest importance as an interpretation of sections eighteen and nineteen of article one of the Constitution of New York relative to workmen's compensation.

## COVERAGE OUTLINE

(Note: S. D. R. is an abbreviation for State Department Reports of New York).

### A. Coverage in general:

- a. The law of compensation and the law of negligence apply to accidental injuries. *Yume v. Knickerbocker Portland Cement Co.*, S. D. R., vol. 3, p. 353; 169 App. Div. 905; 216 N. Y. 653; *Naud v. King Sewing Machine Co.*, 95 Misc. 675, June 20, 1916; *Tracy v. DeLaval Separator Co.*, S. D. R., vol. 7, p. 385; *Eldridge v. Endicott Johnson & Co.*, S. D. R., vol. 8, p. 445; *Surfass v. American La France Fire Engine Co.*, Claim No. 55428; *Smart v. Cruss Kemper Co.*, Claim No. 67003; *Rachlin v. Danziger Paint Co.*, Claim No. 54764.
- b. The law of workmen's compensation is a substitute for the law of negligence. *Jensen v. Southern Pacific Co.*, 215 N. Y. 514; *Rheinwald v. Builders' Brick and Supply Co.*, 168 App. Div. 425; *Miller v. N. Y. Railways Co.*, 171 App. Div. 316.
- c. The substitution of the Workmen's Compensation Law of New York for the law of negligence is but partial.
- d. The law of negligence still applies in so far as the Workmen's Compensation Law has not taken its place. *Shinnick v. Clover Farms Co.*, 90 Misc. 1; 169 App. Div. 236; *Shanahan v. Monarch Engineering Co.*, 92 Misc. 466; 172 App. Div. 221; *Herkey v. Agar Manufacturing Co.*, 90 Misc. 457.
- e. Relative to employers' liability, coverage means the limits of the law of workmen's compensation as a substitute for the law of negligence. *Winfield v. N. Y. C. & H. R. R. Co.*, 216 N. Y. 284.
- f. The Workmen's Compensation Law of New York is to be construed broadly and liberally. *Matter of Petrie*, 215 N. Y. 335; *Costello v. Taylor*, 217 N. Y. 179; *Winfield v. N. Y. C. & H. R. R. Co.*, 168 App. Div. 351; 216 N. Y. 284; *Rheinwald v. Builders' Brick and Supply Co.*, 168 App. Div. 425; *Moore v. Lehigh Valley R. R. Co.*, 169 App. Div. 177; 217 N. Y. Rep. 627.
- g. Two main view-points for the subject of coverage.

B. Coverage from the view-point of employers' liability; the law of negligence still applies to accidental injuries:

a. Not arising out of or in the course of employment.

1. Accidents to persons who are not employees:

- (1) Injured person an independent contractor. *Rheinwald v. Builders' Brick and Supply Co.*, 168 App. Div. 425; *Powley v. Vivian & Co.*, 169 App. Div. 93.

2. Accidents to employees during absence from duty; e. g., before employment begins in the morning, after employment ceases at night, during vacations, etc. *De Voe v. N. Y. State Railways*, 169 App. Div. 472; 218 N. Y. 318; *Berg v. Great Lakes Dredge & Dock Co.*, 173 App. Div. 82, May 3, 1916; *Pogue v. Nassau Light and Power Co.*, S. D. R., vol. 1, p. 429; *Sokol v. Clyde Steamship Co.*, S. D. R., vol. 6, p. 339; *Hotaling v. Standard Oil Co. of N. Y.*, S. D. R., vol. 6, p. 308.

3. Accidents to employees, while on duty, but not incidental to their hazardous employments:

- (1) Employee engaged in another and a non-hazardous employment at the time of his injury. *Newman v. Newman*, 169 App. Div. 745; 218 N. Y. 325; *Gleisner v. Gross & Herbener*, 170 App. Div. 37.
- (2) Employee drowned while in swimming as diversion from work. *McManus v. R. H. Macy & Co.*, S. D. R., vol. 6, p. 344.
- (3) Employee injured while catching a ride along a public highway on a private vehicle belonging to person other than his employer. *Peers v. DeCarion & Co.*, S. D. R., vol. 5, p. 426.
- (4) Employee injured by medicine or other substance not taken at his employer's initiative — poison taken by mistake. *O'Neil v. Carley Heater Co.*, S. D. R., vol. 6, p. 314; 171 App. Div. 922; 218 N. Y. 214.
- (5) Employee injured by horseplay. *DeFilippis v. Falkenburg*, 170 App. Div. 153; 219 N. Y. Rep. —, Oct. 24, 1916.



- (6) Employee's injury due to assault not connected with his work. *Myers v. Smith*, Claim No. 6222, March 29, 1915; *Cowen v. Cowen's New Shirt Laundry*, S. D. R., vol. 8, p. 481; App Div. —, Dec. 29, 1916.
- (7) Employee's injury due to disease not attributable to his work. *Collins v. Brooklyn Union Gas Co.*, 171 App. Div. 381.
- b. Arising out of and in the course of employment not included within some one of the groups enumerated in Workmen's Compensation Law, § 2. (The courts by exclusion and inclusion are defining and fixing the limits of these groups.) *DeLaGardelle v. Hampton Co.*, 167 App. Div. 617; *Mihm v. Hussey*, 169 App. Div. 742; *Tomassi v. Christensen*, 171 App. Div. 284; *Guthiel v. Consolidated Gas Co.*, 94 Misc. 690; *Grady v. Holliday*, 171 App. Div. 959; *Wilson v. Dorflinger & Sons*, 170 App. Div. 119; 218 N. Y. 84; *Sheridan v. Groll Construction Co.*, 171 App. Div. 958; 218 N. Y. Rep. 633; *McIntire v. Hilliard Hotel Co.*, 171 App. Div. 958; 218 N. Y. Rep. 642; *Chappelle v. Four Hundred and Twelve Broadway Co.*, 171 App. Div. 958; 218 N. Y. Rep. 632; *Cremin v. Mordecai & Son*, 171 App. Div. 958.
- c. Arising out of and in the course of employment included within some one of the groups enumerated in Workmen's Compensation Law, § 2, where
  - \*1. Compensation is not provided in schedule of Workmen's Compensation Law, § 15. *Shinnick v. Clover Farms Co.*, 90 Misc. 1; 169 App. Div. 236.†
  - \*2. The employee dies from accident and leaves surviving person or persons not dependent under Workmen's Compensation Law and entitled to recover under law of negligence. *Shanahan v. Monarch Engineering Co.*, 92 Misc. 466; 172 App. Div. 221.‡

\* The decision of the Court of Appeals, reversing the decisions of the Appellate Division and the Commission in the Shanahan case, has been handed down, Dec. 29, 1916, while this bulletin is in press. Its effect is to exclude operation of the law of negligence in these two instances.

† Compensation for disfigurement has been provided for by amendment of L. 1916, ch. 622, to § 15, subd. 3, of the Workmen's Compensation Law.

‡ Compare amendment of L. 1916, ch. 622, to Workmen's Compensation Law, § 11.

3. The injured employee is a farm laborer or a domestic servant.
4. The employer has failed to take out insurance under the Workmen's Compensation Law. *Miller v. N. Y. Railways Co.*, 171 App. Div. 316; *Lindebauer v. Weiner*, 94 Misc. 612; *Dick v. Knoperbaum*, 157 N. Y. Supp. 754, March 13, 1916.
5. The accident is due to the wilful intention of the injured employee to bring about the injury or death of himself or another. *Ignatowsky v. Berman*, S. D. R., vol. 6, p. 326; *Ludwig v. Groh's Sons*, S. D. R., vol. 8, p. 426.
6. The accident is due solely to intoxication of the injured employee while on duty. *Butler v. Sheffield Farms*, S. D. R., vol. 6, p. 368; *Minnaugh v. Brooklyn Union Gas Co.*, S. D. R., vol. 8, p. 466; *Carroll v. Knickerbocker Ice Co.*, 169 App. Div. 450; 218 N. Y. 435; *Dunn v. West End Brewing Co.*, S. D. R., vol. 5, p. 380; 174 App. Div. 900, June 30, 1916; *Kiernan v. Friestedt Underpinning Co.*, S. D. R., vol. 5, p. 390; 171 App. Div. 539; *Berg v. Great Lakes Dredge & Dock Co.*, 173 App. Div. 82, May 3, 1916; *Sullivan v. Industrial Engineering Co.*, 173 App. Div. 65, May 3, 1916; *Winters v. New York Herald Co.*, 171 App. Div. 960.
7. The employee is injured through negligence of another not in the same employ. *Lester v. Otis Elevator Co.*, 90 Misc. 649; 169 App. Div. 613; *U. S. F. & G. Co. v. N. Y. Railways Co.*, 93 Misc. 118; *Cahill v. Terry & Tench Co.*, 173 App. Div. 418, June, 1916; *Winter v. Doelger Brewing Co.*, 95 Misc. 150; *Miller v. N. Y. Rys. Co.*, 171 App. Div. 316; *Herkey v. Agar Manufacturing Co.*, 90 Misc. 457; *Woodward v. Conklin & Son*, 171 App. Div. 736.
8. The employment is not conducted for pecuniary gain. *Bargey v. Massaro Macaroni Co.*, 170 App. Div. 103; 218 N. Y. 410; *Mihm v. Hussey*, 169 App. Div. 742; *Opinion of Attorney-General, Report for 1914*, vol. 2, p. 191; *Jennings v. Department of Public Works of*

*the State of New York*, S. D. R., vol. 5, p. 416; *Allen v. State of New York*, S. D. R., vol. 6, p. 376; 173 App. Div. 455, June 30, 1916; *Opinion of Attorney-General*, July 3, 1916.

9. The injured employee is working solely in an employment not covered by Workmen's Compensation Law, § 2, though for an employer who is so covered. *Aylesworth v. Phoenix Cheese Co.*, 170 App. Div. 34.\*
  10. The injured employee is working in an employment not covered by Workmen's Compensation Law, § 2, though for an employer who is also engaged in another and an entirely distinct employment that is so covered. *Sickles v. Ballston R. S. Co.*, 171 App. Div. 108; *Mandel v. Steinhardt & Bros.*, 173 App. Div. 515, June 30, 1916; *Lyon v. Windsor & Davis*, 173 App. Div. 377, May 18, 1916; *Brown v. Richmond Light & R. R. Co.*, 173 App. Div. 432, June 30, 1916.
  11. The injured employee's contract of employment relates solely to work to be performed outside of the State. *Gardner v. Horseheads Construction Co.*, 171 App. Div. 66; *Pritz v. Beaumont Co.*, 170 App. Div. 943.
  12. The injured employee neither resides in, nor is injured in New York State, though his contract of employment has been made there. *Lloyd v. Power Specialty Co.*, S. D. R., vol. 7, p. 409; *Lehmann v. Ramo Films*, 92 Misc. 418.
  13. The accident is due to negligence of a railroad engaged in interstate commerce. *Winfield v. N. Y. C. & H. R. R. Co.*, 216 N. Y. 284; *Jensen v. Southern Pacific Co.*, 215 N. Y. 514.
  14. The accident occurs upon waters subject to the admiralty jurisdiction of the United States courts. *Walker v. Clyde Steamship Co.*, 215 N. Y. 529.
- C. Coverage from the view-point of workmen's compensation; the Workmen's Compensation Law applies to accidental injuries arising in employment included within some one of the groups enumerated in § 2, *even when*:

\* Since the determination in the Aylesworth case, the ice industry has been made a hazardous employment by amendment of L. 1916, ch. 622, to Workmen's Compensation Law, § 2, group 25.

- a. The injured employee is working for a railroad engaged in interstate commerce:
  1. If the accident is not due to the railroad's negligence. *Winfield v. N. Y. C. & H. R. R. Co.*, 168 App. Div. 351; 216 N. Y. 284; *Jensen v. Southern Pacific Co.*, 215 N. Y. 514; *Moore v. Lehigh Valley R. R. Co.*, 169 App. Div. 177; 217 N. Y. 627; *Stevens v. Lehigh Valley R. R. Co.*, S. D. R., vol. 3, p. 378; 171 App. Div. 961; *Hall v. Lehigh Valley R. R. Co.*, S. D. R., vol. 4, p. 441; 171 App. Div. 961; *Shea v. Lehigh Valley R. R. Co.*, 171 App. Div. 961; *Saxon v. Erie R. R. Co.*, 172 App. Div. 913, January 5, 1916.
  2. If the work is other than railroad work proper. *Jensen v. Southern Pacific Co.*, 215 N. Y. 514.
  3. If the work consists in repairing an empty car that has been or will be used in interstate commerce. *Parsons v. Delaware and Hudson Co.*, 167 App. Div. 536; *Okrzesz v. Lehigh Valley R. R. Co.*, 170 App. Div. 15.
  4. If the railroad, though an intra-state carrier, occasionally carries interstate baggage, freight, passengers, cars, etc. *Fairchild v. Pennsylvania Railroad Co.*, 170 App. Div. 135.
  5. If the work is new construction work. *White v. N. Y. C. & H. R. R. Co.*, 169 App. Div. 903; 216 N. Y. Rep. 653.
  6. If the work consists in taking inventory of materials and supplies which have not yet been used in interstate commerce. *Waite v. Pennsylvania R. R. Co.*, S. D. R., vol. 3, p. 364; 172 App. Div. 914, January 5, 1916.
- b. Remedy for the injury exists also in admiralty. *Walker v. Clyde S. S. Co.*, 215 N. Y. 529; *Opinion of Counsel of Workmen's Compensation Commission*, S. D. R., vol. 1, p. 413.
- c. The injury is incidental to the hazardous employment:
  1. The occupation is incidental. *Costello v. Taylor*, 217 N. Y. 179; *Leslie v. O'Connor & Reichman*, S. D. R.,

- vol. 5, p. 383; 173 App. Div. 988, May 3, 1916; *White v. N. Y. C. & H. R. R. Co.*, S. D. R., vol. 2, p. 477; 169 App. Div. 903; 216 N. Y. 653; *Sorge v. Aldebaran Co.*, S. D. R. vol. 3, p. 390; 171 App. Div. 959; 218 N. Y. Rep. 636.
2. The work is incidental. *Costello v. Taylor*, 217 N. Y. 179; *Gleisner v. Gross & Herbener*, 170 App. Div. 37; *Smith v. Price*, 168 App. Div. 421; *Larsen v. Paine Drug Co.*, 169 App. Div. 838; 218 N. Y. 252; *Hendricks v. Seeman Bros.*, S. D. R., vol. 3, p. 385; 170 App. Div. 133; *Miller v. Taylor*, 173 App. Div. 865, June 30, 1916; *Glatzl v. Stumpp*, S. D. R., vol. 6, p. 397; 174 App. Div. 901, June 30, 1916\*; *Berliner v. Ritchie & Cornell*, S. D. R., vol. 4, p. 446; 172 App. Div. 913, January 5, 1916; *Benton v. Fraser*, S. D. R., vol. 5, p. 392; 172 App. Div. 913, January 5, 1916; *Praino v. Peloso*, 171 App. Div. 963; *Mooney v. Weber Piano Co.*, S. D. R., vol. 5, p. 398; 172 App. Div. 917, January 18, 1916; *Meyer v. Morris & Co.*, S. D. R., vol. 6, p. 339; 173 App. Div. 990; — N. Y. —, Dec. 12, 1916.
3. The employee is injured while coming to, or leaving work. *Kiernan v. Friestedt Underpinning Co.*, S. D. R., vol. 5, p. 390; 171 App. Div. 539; *Di Paolo v. Crimmins Contracting Co.*, S. D. R., vol. 5, p. 438; 173 App. Div. 988; 219 N. Y. —; *Hill v. N. Y. Consolidated R. R. Co.*, 174 App. Div. 900, June 30 1916; *Countryman v. Newman*, S. D. R., vol. 7, p. 421; 174 App. Div. 900, June 30, 1916; *Lazarick v. N. Y., New Haven & Hartford R. R. Co.*, 171 App. Div. 959; *Bennett v. Russell & Sons Co.*, S. D. R., vol. 6, p. 403; *Diciaiulo v. Kerbaugh*, S. D. R., vol. 1, p. 424; *Foley v. Bretton Hall Co.*, S. D. R., vol. 4, p. 339; 172 App. Div. 914; *Avanzato v. Erie R. R. Co.*, S. D. R., vol. 4, p. 397; — App. Div. —; S. D. R., vol. 8, p. 414; *Carini v. Nickel Plate R. R.*, S. D. R., vol. 4, p. 423; *Gray v. DeJong*, S. D. R., vol. 5, p. 404; 173 App. Div. 922.

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\*Reversed by Court of Appeals, Jan. 20, 1917.

4. The employee is injured while ascending or descending stairs. *Nicholson v. Klipstein & Co.*, S. D. R., vol. 4, p. 412; 171 App. Div. 970; *Leslie v. O'Connor & Richman*, S. D. R., vol. 5, p. 383; 173 App. Div. 988, May 3, 1916.
5. The injury is due to a slippery floor. *Winters v. New York Herald Co.*, 171 App. Div. 960.
6. The employee is injured while attending to a call of nature. *Putnam v. Murray*, S. D. R., vol. 6, p. 355; vol. 7, p. 407; 174 App. Div. 720, September 13, 1916; *Cino v. Morton & Gorman Contracting Co.*, S. D. R., vol. 5, p. 387; 172 App. Div. 917, January 18, 1916; *De Filippis v. Falkenberg*, 170 App. Div. 153; 219 N. Y. Rep. —, Oct. 24, 1916.
7. The employee is injured while seeking shelter from storm. *Moore v. Lehigh Valley R. R. Co.*, 169 App. Div. 177; 217 N. Y. Rep. 627.
8. The injury consists in poisoning. *Plass v. Central New England Railway Co.*, 169 App. Div. 826.
9. The injury is due to assault. *Yume v. Knickerbocker Portland Cement Co.*, 169 App. Div. 905; 216 N. Y. 653; *Harnett v. Steen Building Co.*, 169 App. Div. 905; 216 N. Y. 101; *James v. Witherbee Sherman & Co.*, S. D. R., vol. 2, p. 483; *Heitz v. Ruppert Brewing Co.*, 171 App. Div. 961; 218 N. Y. 148; *Carbone v. Loft*, 174 App. Div. 901, June 30, 1916; 219 N. Y. Rep. —, Oct. 24, 1916.
10. The injury is due to a machine owned and regulated by the injured employee. *Kingsley v. Donovan*, 169 App. Div. 828.
11. The employee is injured as a result of going to the aid or rescue of another employee. *Waters v. Taylor Co.*, 170 App. Div. 942; 218 N. Y. 248; *Martucci v. Hills Bros. Co.*, 171 App. Div. 370; *Harrison v. Kane*, 169 App. Div. 905.
- d. The employee is injured through negligence or wrong of another not in the same employ. *Lester v. Otis Elevator Co.*, 90 Misc. 649; 169 App. Div. 613.

- e. The employer has failed to take out insurance in compliance with the Workmen's Compensation Law. *Dearborn v. Peugeot Auto Import Co.*, 170 App. Div. 93.
- f. The injured employee is away from the plant of his employer at the time of the injury. *Fiocca v. Dillon*, S. D. R., vol. 7, p. 399; — App. Div. —, November 15, 1916.
- g. The injured employee is without the State at the time of the injury. *Post v. Burger & Gohlke*, 168 App. Div. 403; 216 N. Y. 544; *Spratt v. Sweeney & Gray Co.*, 168 App. Div. 403; 216 N. Y. Rep. 763; *Valentine v. Smith, Angevine & Co.*, 168 App. Div. 403; 216 N. Y. Rep. 763.
- h. The injured employee is an independent contractor acting incidentally at time of the accident as an employee. *Powley v. Vivian & Co.*, 169 App. Div. 170.
- i. The injury consists in infection or disease resulting from the accident. *Carroll v. Knickerbocker Ice Co.*, 169 App. Div. 450; 218 N. Y. 435; *Sullivan v. Industrial Engineering Co.*, S. D. R., vol. 6, p. 401; 173 App. Div. 65, May 3, 1916; *Dunn v. West End Brewing Co.*, S. D. R., vol. 5, p. 380; 174 App. Div. 900, June 30, 1916; *Winters v. N. Y. Herald Co.*, 171 App. Div. 960; *Putnam v. Murray*, S. D. R., vol. 6, p. 355; vol 7, p. 407; 174 App. Div. 720, September 13, 1916; *Bridge-man v. McLoughlin*, S. D. R., vol. 7, p. 425; *Plass v. Central New England Railway Co.*, 169 App. Div. 826; *Rist v. Larkin & Sangster*, S. D. R., vol. 5, p. 381; 171 App. Div. 71; *Henry v. Levor & Co.*, S. D. R., vol. 6, p. 388; *McMurray v. Little & Ives Co.*, S. D. R., vol. 3, p. 395; *McMahon v. Interborough R. T. Co.*, S. D. R., vol. 5, pp. 371, 374; *Bloomfield v. November*, S. D. R., vol. 5, p. 385; 172 App. Div. 917; 219 N. Y. 374, Dec. 12, 1916; *Petcheck v. Degnon Contracting Co.*, S. D. R., 1916; *Petcheck v. Degnon Contracting Co.*, S. D. R., vol. 6, p. 394; *Brown v. Richmond Light & R. R. Co.*, S. D. R., vol. 7, pp. 371, 420; 173 App. Div. 432; *Cook v. N. Y. C. & H. R. R. Co.*, S. D. R., vol. 8, p. 469; *Partridge v. Norwich Pharmacal Co.*, S. D. R., vol. 6,

- p. 336; — App. Div. —, Nov. 29, 1916; *Cappelli v. Cranford*, S. D. R., vol. 6, p. 349; *Hyland v. Winant*, S. D. R., vol. 6, p. 304; *Stanley v. Wood & Dolson Co.*, S. D. R., vol. 6, p. 383; *Mohr v. Cranford*, S. D. R., vol. 7, p. 376.
- j. The injury consists in hernia. *Ulrich v. Lenox Coat, Apron & Towel Supply Co.*, 171 App. Div. 958; *Mooney v. Weber Piano Co.*, 172 App. Div. 917, January 18, 1916; *Staab v. American Malting Co.*, S. D. R., vol. 7, p. 374; *Krenzien v. Jasper*, S. D. R., vol. 7, p. 373; *Mike v. Glens Falls Portland Cement Co.*, S. D. R., vol. 7, p. 435; *Neuner v. Hanschman*, S. D. R., vol. 8, p. 500.
- k. The injured employee has made false statements in obtaining his employment. *Kenny v. Union Railway Co.*, 166 App. Div. 497.
- l. The injured employee is also an officer or stockholder, or both, of his employer company. *Bechmann v. Oelerich*, 174 App. Div. 353, September 13, 1916; *Cantor v. Rubin Musicant Co.*, S. D. R., vol. 3, p. 392; *Kennedy v. Kennedy Manufacturing & Engineering Co.*, S. D. R., vol. 7, p. 383; *Monthly Bulletin of State Department of Labor*, vol. 1, no. 8, p. 8.
- m. Close cases under Workmen's Compensation Law, § 2. *Edwardsen v. Jarvis Lighterage Co.*, 168 App. Div. 368; *Mazzarisi v. Ward & Tully*, S. D. R., vol. 4, p. 443, 170 App. Div. 868.

## DECISIONS.

### A. Coverage in General.

a. *The law of compensation and the law of negligence apply to accidental injuries.*—The actual occurrence of an accident is an indispensable prerequisite to compensation or damages. According to Workmen's Compensation Law, § 3, subd. 7, the injury must be an "accidental injury" and according to Workmen's Compensation Law, § 10, an "accidental personal injury." These terms are not defined in the law. Their definition has been left to the State Workmen's Compensation Commission, its successor, the



State Industrial Commission, and the courts charged with review of their rulings. Accidents have long since been judicially defined relative to the law of negligence and the law of insurance. (Cf. *Naud v. King Sewing Machine Co.*, below, p. 402.) The new subject of workmen's compensation has required some restatement and reapplication of the definition. The Workmen's Compensation Commission of New York took up and passed upon the question in three assault cases for which it awarded compensation in January, 1915.\* Two of these rulings were carried successively to the Appellate Division and the Court of Appeals and approved without opinion. The Commission drew from British Workmen's Compensation decisions the definition of an accident as "An unlooked for mishap or an untoward event which is not expected or designed," the words "not expected or designed" being limited so that "an act done deliberately and wilfully by a third party may be an accident from the view point of employer and employee." The element of time enters into the determination whether a particular injury is accidental or not. If the injury develops slowly it can hardly be held to be unexpected on the part of the injured employee. A flying splinter may instantly destroy the vision of one employee; work in poor light may gradually blind another. A fall caused by a fainting spell traceable to overheating of a workroom may take the life of one employee; years of work in the same overheated workroom may cut short the span of another. The Workmen's Compensation Law of New York permits compensation for disease resulting from an accident but not for an accident resulting from disease. This often calls for close decisions because of difficulties in tracing cause and result.† When an employee's fingers are caught in a machine and mangled or cut off, no question that an accident has occurred arises; but when a slight abrasion of the skin admits the germs of poison, disease or infection, evidence of the abrasion may be insufficient. Other accidents not so traceable as mangling, cutting or crushing, as to cause and result, are: plunging into cold water, freezing, nervous shock, inhalation of fumes, loss of hearing and rupture of internal organs. The following cases in which the Commission decided that the injuries were not accidental are cited by its former Counsel: loss of vision due to strong light: *Surfass v. American*

\* The full texts of these, and a later court case, appear below, pp. 205-217.

† Compare the subjects of disease and hernia below, pp. 100-102, 249-256.

*LaFrance Fire Engine Co.*, Claim No. 55428; cramping of a hand through continued use of a heavy axe: *Smart v. Cruss Kemper Co.*, Claim No. 67003; a swollen elbow and arm caused by constant twisting of cans: *Tracy v. DeLaval Separator Co.*, S. D. R., vol. 7, p. 385; lead poisoning: *Rachlin v. Danziger Paint Co.*, Claim No. 54764; and anthrax contracted in the course of the employment through a razor cut occurring away from the place of work, the razor cut and not the entrance of the germ constituting the accident: *Eldridge v. Endicott Johnson & Co.*, S. D. R., vol. 8, p. 445.\*

b.— *Substitution of law of compensation for law of negligence.* — The law of workmen's compensation is a substitute for the law of negligence. Discussion of the new system, before and after its adoption, has contrasted it with the old and has presented the substitution at every turn. The Workmen's Compensation Law of New York makes exceptions to its own operation admitting resort to the law of negligence (§§ 11, 29) and declares that contribution of premiums to the state fund relieves employers of liability (§ 53). The courts charged with interpretation of the Workmen's Compensation Law have referred to the substitution and contrasted the two systems in their decisions. The Court of Appeals, speaking through Judge Miller, has said:

"With the change in industrial conditions, an opinion has gradually developed, which almost universally favors a more just and economical system of providing compensation for accidental injuries to employees as a substitute for wasteful and protracted damage suits, usually unjust in their results either to the employer or the employee, and sometimes to both." *Jensen v. Southern Pacific Co.*, 215 N. Y. 528, July 13, 1915.

The Appellate Division, speaking through Justice Woodward, has said:

"The Workmen's Compensation Law must in fairness be deemed to have been enacted in furtherance of a legislative determination, enforced by explicit mandate of the people through amendment of the State Constitution (Art. 1, § 19), that a new and different scheme and basis of indemnity for industrial accidents should be adopted in this State, in the light of the social experience of other Commonwealths and countries. Injuries sustained by those who perform the manual and mechanical tasks of an industry must be deemed to have been intended by this statute to be made a social risk, a liability of the industry, a charge upon the production cost of the article manufactured or the service rendered. Hitherto the rule of our statute and fundamental law had been

\* Connor's Employers' Liability. Workmen's Compensation and Liability Insurance, pp. 100, 101.

that any right of recovery for industrial accidents must arise from a breach of the master's duty as to care and safeguards, and accordingly was limited by whatever contractual relation existed between the person injured and the person whose breach of duty was the efficient cause of the injury. For this historic concept of liability springing from omission of legal duty created by contractual relation there has been substituted an application of the social principle that, regardless of duty and regardless of fault, the expenses and loss of earnings resultant from occupational injury to a workman engaged in carrying on an inherently hazardous business or avocation of an employer should be paid in the first instance by the employer and by him be made a charge against the operating costs of the business. In place of the traditional juristic rule that the master must respond in damages when his servant is injured through the master's fault, and that otherwise the servant must go unrecompensed and the loss be borne by him alone, the people and Legislature have now put in force the changed concept that the *trade product* should be charged with all consequences of inherent trade hazards, and that loss to individual workers through disability while engaged in the service of the proprietor of the business should be distributed among all its consumers or patrons, rather than left to operate ruinously against the disabled employee or the solitary employer." \* \* \* "A careful reading of the messages of successive Governors upon the subject, an examination of the exhaustive report prepared by the so-called Wainwright Commission of 1909, which drafted the State's first compensation law, an analysis of the decision of the Court of Appeals (*Ives v. South Buffalo R. Co.*, 201 N. Y. 271), holding that such a statute could not be put in force in this State without explicit amendment of the Constitution, combine to remove any doubt as to the legislative purpose to supersede 'rules of law governing legal liability' which were stated by Governor Hughes, in his annual message to the Legislature of 1910, to 'offend the common sense of fairness' and the purpose likewise to carry out the recommendation of the Wainwright Commission that the State should 'establish a new system of compensation for accidents to workmen.'" *Rheinwald v. Builders Brick and Supply Co.*, 166 App. Div. 426, 427, 438, 439, May 14, 1915.

The substitutive character of the Workmen's Compensation Law is evidenced by its exceptions. One of these (§ 11) gives the injured employee a right of action for negligence free of the ordinary defenses where his employer has failed to secure payment of compensation; another, (§ 29) permits an employee injured by the negligence of another not in the same employ to elect between a claim against his employer for compensation and a suit against the third party for damages and, in case he elects compensation, assigns his cause of action against the third party to the person liable for the compensation. The texts of the cases that have arisen under §§ 11 and 29, except the text given here, appear below under the headings, "The employer has failed to take out insurance under the Workmen's Compensation Law," pp. 111, 232,

and "The employee is injured through negligence of another not in the same employ," pp. 116, 221. The decision in *Herkey v. Agar Manufacturing Co.*, appearing under the heading "Constitutionality," at p. 32, is also in point. In this connection is presented a case under § 29 in which the injured employee sought to recover both compensation and damages by presenting a claim against his employer to the Workmen's Compensation Commission and by instituting an action against the third party in the Supreme Court. In an action for damages the Supreme Court overruled the plaintiff's demurrer to the defense that he had already made claim for compensation and gave interlocutory judgment for the defendant. The Appellate Division unanimously affirmed the Supreme Court as follows:

JENKS, P. J.: This action is for negligence whereby plaintiff was personally injured. The sole question presented is whether the defendant, who was not the master, can plead as a separate defense that the plaintiff, prior to the commencement of this action, made claim under the Workmen's Compensation Law for compensation for his disability due to the accident (which is the basis of this action), and received an award of compensation. Section 29 of the said act reads: "Subrogation to remedies of employee. If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the Commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the State for the benefit of the State insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the State insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the State may be prosecuted or compromised by the Commission. A compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the Commission, if the deficiency of compensation would be payable from the State insurance fund, and otherwise with the written approval of the person, association or corporation liable to pay the same." (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 29.)

To my mind, this section is neither ambiguous nor obscure. The scheme of the statute is to provide "Compensation \* \* \* for injuries sustained or death incurred \* \* \* resulting from an accidental personal injury" (§§ 2 and 10). The theory of the present action is recovery of compensation. Thus

in *Birdsall v. Coolidge* (93 U. S. 64) the court says: "Damages are given as a compensation, recompense or satisfaction to the plaintiff for an injury actually received by him from the defendant. Compensatory damages and actual damages mean the same thing; that is, that the damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less, whether the injury be to the person or estate of the complaining party. 2 Greenl. Ev. (10th ed.) sect. 253." The rights of the servant under this statute, and of the servant as an individual under the common law or the statutes, are alike remedies which are open to him. (*Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514, 526.) The Act is but cumulative and alternative, and does not impair the latter remedy. The Act affects such remedy only when the individual as a servant elects to receive compensation under the Act.

The reason for the statutory declaration as to election is founded upon the common-law rule that there should not be a double satisfaction for the same injury. (*Walsk v. N. Y. C. & H. R. R. Co.*, 204 N. Y. 58, 62, 63; *Gambling v. Haight*, 59 id. 354.) The right thus to prescribe election is not affected by the circumstance that the compensation is, under the statute, to be determined by data, which are not prescribed for the jury in an action. Thus Herman on Estoppel says (Vol. 2, § 1051): "Where a party has two or more remedies for the same wrong, in which the measure of damages might be different, electing one and pursuing it to judgment is a bar to any other remedy." (See, too, remarks of WRIGHT, J., in *Tong v. Great Northern R. Co.*, 86 L. T. Rep. [N. S.] 802, 803, and of ROWLATT, J., in *Woodcock v. London and North-Western R. Co.*, 109 L. T. Rep. 253, 257, 258.) The ultimate fact is that the purpose and result of either remedy is compensation for the personal injury.

If it be urged that the compensation provided for by the statute is insurance, the answer is that the servant does not receive compensation through insurance effected by him, i. e., as the result of any contract made by him in exchange for his payment of premium or assessment. This circumstance is indicated by the restrictive provisions of section 31 of the Act. He receives compensation under the Act perforce of the injury, whereas he would not receive insurance perforce of the injury alone but also because of his payment of premium or assessment.

Under other but similar provisions the courts in other jurisdictions have recognized the effect of such an election as is prescribed by said section 29 of our Act. (20 Lord Halsbury's Laws of England, 195; *Oliver v. Nautilus S. S. Co.*, 19 T. L. R. 607; *Tong's Case*, *supra*; *Woodcock's Case*, *supra*; *Cripp's Case*, 216 Mass. 586.) In *Lester v. Otis Elevator Co.* (169 App. Div. 613) this court in the First Department say: "Where an employee is injured by the act of a third party, in the course of his employment, he is nevertheless entitled to claim compensation under the statute. But it is only reasonable that, in such cases, the third party should be made to pay the damages caused by his wrongful act, and, of course the employee is not entitled to such damages and the statutory compensation at the same time. Section 29 accordingly makes provision for the employer's 'Subrogation to remedies of employee.' Under that section, if the employee claims compensation under the statute, his cause of action against the third party is assigned to the

State, if the compensation is payable from the State insurance fund, and otherwise to the person liable for the payment of the compensation. In other words, the party who has to pay or secure the statutory compensation can then recover the damages for which the third party is liable."

The effect of the plaintiff's action by proceeding under the statute is well stated in *McGarvey v. Independent O. & G. Co.* (156 Wis. 580, 583).

We are cited by the appellant to the case of *Newark Paving Co. v. Kloits* (85 N. J. L. 432; 91 Atl. Rep. 91; affd. on opinion 92 id. 1086). The decision is made by an eminent judge. But it is to be noted that it rests on the act of 1911 (New Jersey Laws of 1911, chap. 95), and that in the course of his opinion SWAYZE, J., says: "It is true this conclusion makes it possible for the employé to secure, under the act of 1911, double compensation. This was probably not the intent of the Legislature, though, as we think, the result of the language of the statute. The difficulty seems to be obviated by the amendment of 1913. (Pamph. L. pp. 312, 313)."\* Examination of the amendment referred to shows a provision substantially similar in its purpose and effect, so far as double compensation is concerned, as is section 29 of our own statute.

The interlocutory judgment should be affirmed, with costs.

Present — JENKS, P. J., THOMAS, CARR, STAPLETON and PUTNAM, JJ.

Interlocutory judgment unanimously affirmed, with costs. *Miller v. New York Railways Co.*, 171 App. Div. 316, January 21, 1916.

c. *The substitution but partial.*—But it is plain, also, as all the following presentation of the subject of coverage will show and emphasize, that the substitution of the Workmen's Compensation Law of New York for the law of negligence is but partial. The Workmen's Compensation Law does not repeal the so-called Employers' Liability Act of New York (Labor Law, Art. 14). It does not go as far by way of the substitution for negligence as the workmen's compensation laws of numerous other States and countries. (Bulletin No. 126 of the United States Department of Labor entitled "Workmen's Compensation Laws of the United States and Foreign Countries.")

d. *Residual application of the laws of negligence.*—According to time-honored rules of legal construction, the law of negligence still applies in so far as the Workmen's Compensation has not taken its place. Such residual applicability goes without saying where the employment of the injured employee is not among the enumerated employments of Workmen's Compensation Law, § 2. Enactment of the Workmen's Compensation Law has not affected the right of such employees to action against their employers for negligence. The Workmen's Compensation Law recognizes the

\* See New Jersey Laws of 1913, ch. 174, amdg. New Jersey Laws of 1911, ch. 95, § 23.—[REP.]

principle in the provision holding the law of negligence still applicable when injury occurs to an employee whose employer has failed to insure (§ 11). The Supreme Court, in two much discussed cases, has even held that the law of negligence may still apply to employers who have fully complied with the Workmen's Compensation Law. In denying the application of the Workmen's Compensation Law and sustaining a cause of action for negligence in a case of disfigurement of an employee — loss of part of an ear by the bite of a horse — the court said:

"As to such an injury, therefore, the right to recover remains as it was before the act (Workmen's Compensation Law) was passed." *Shinnick v. Clover Farms Co.*, 169 App. Div. 238, July 9, 1915.

In the second case, *Shanahan v. Monarch Engineering Co.*, an action of an adult sister under Section 1902 of the Code of Civil Procedure for pecuniary loss through death of her brother, the court entered into discussion of the principle at much greater length than in the *Shinnick* case. It construed Sections 18 and 19 of the Constitution of New York together. It concluded that the language of Section 11 of the Workmen's Compensation Law making the liability to pay compensation exclusive meant simply possession of an exclusive liability and remedy by persons specified in the Workmen's Compensation Law and that the common law right of action remained to persons not specified in the Workmen's Compensation Law "notwithstanding the language of the statute saying the liability created by the statute" is "exclusive."\*

e. *The term "Coverage."*—By far the great majority of the workmen's compensation cases appealed from the Commission to the Appellate Division in New York have turned upon the question of the general applicability of the Workmen's Compensation Law. To express such applicability, not only of the New York compensation law but of compensation laws of other States or countries, the new term "coverage" has come into use. The word is unknown to the dictionaries. It appears to have been used as an adjective in the phrase "coverage clause" as applied to fire insurance policies. Coverage, in its broader application, means the scope or jurisdiction of the law of workmen's compensation. Coverage, relative to employer's liability, means the limits

\* For the full text and later history of the *Shinnick* and *Shanahan* decisions, including a decision of the Court of Appeals reversing the decisions of the lower courts in the *Shanahan* case, see below, pp. 298-300, 315-327.

of the law of workmen's compensation as a substitute for the law of negligence. The courts have the somewhat intricate task of mapping out and allotting a twilight zone that lies between the employer's liability system and the workmen's compensation system. The extent of this middle ground has been indicated by Judge Seabury of the New York Court of Appeals in a comparison of the Workmen's Compensation Law with the Federal Employers' Liability Act. He says:

"A recognition of the principles upon which the Federal and state statutes are founded will demonstrate that they are not *in pari materia*. The Federal Employers' Liability Act prescribes the rules under which certain employers are liable to their employees for injuries which result to the latter from negligence. The Workmen's Compensation Law is radically different in principle, purpose, scope and method from the Federal Employers' Liability Act. It inaugurated an entirely new method of dealing with industrial accidents. Under the provisions compensation paid to the employee under the state statute is the result of injury arising in the course of employment and is paid regardless of fault or contract. The *principle* underlying the state statute is that as injuries to workmen are necessarily incident to the operation of certain hazardous occupations, the expense of compensating the employees for such injuries is properly chargeable upon the occupation. The *purpose* of this act was to establish an insurance fund to which employers are required to contribute, out of which fund compensation to the workmen is paid and contribution to which by the employer relieves him of further liability. The *scope* of the act is much broader than the Federal Employers' Liability Act, because under its provisions the employee is awarded compensation for all accidental injuries arising in the course of his employment whether they result from negligence or not, which are not self-inflicted or sustained as the result of intoxication. The *method* by which compensation is given to the employee is different from the method by which redress may be secured in an action brought under the provisions of the Federal Employers' Liability Act. Under the state statute the injured employee presents his claim to an administrative board or commission. Notice is given to the parties interested. The proceedings are informal. The compensation awarded the employee is not such as is recoverable under the rules of damages applicable in actions founded upon negligence. It is based on loss of earning power and compensation for medical, surgical or other attendance or treatment or funeral expenses. Perhaps, without inaccuracy, it may be said that the primary purpose of this act was to give compensation in those cases where no claim of negligence on the part of the employer could reasonably be made. Having in mind the different *principles* which underlie the two statutes, the different *purposes* sought to be accomplished by them, the restricted *scope* of the Federal Statute and the broad scope of the state statute and the different *method* by which redress is obtained under these statutes, can they reasonably be said to cover the same subject-matter?" *Winfield v. N. Y. O. & H. R. R. Co.*, 216 N. Y. 288, 289, November 23, 1915.



f. *Broad and liberal construction.*— For their general guidance in this task of determining the coverage of the Workmen's Compensation Law the courts declare that it is to be construed broadly and liberally. They find justification for such construction in its spirit and beneficent intent. The Appellate Division, speaking through Justice Woodward in a notable early decision contravening interpretation of the Workmen's Compensation Law by the Workmen's Compensation Commission, has said:

"It must be predicated as a fundamental canon of the proper construction of the Workmen's Compensation Law that the statute is to be construed remedially and beneficially, with the view of carrying out fairly and fully the legislative purpose, and with the view to bringing within the purview and operation of the act all workers whose accidental injuries are inherent occupational risks, rather than with the view to excluding from the operation and protection of the act persons whose claims to its benefits fall fairly within the principle that disabilities to workers through trade mishaps should not be left to hang burdensomely on individuals who might thereby be forced into the class of dependents on public or private charity." *Rheinwald v. Builders Brick and Supply Co.*, 168 App. Div. 438, May 14, 1915.

Again, speaking through Justice Lyon, it has said:

"That the purpose of the Workmen's Compensation Law was to make the risk of an accidental injury one of the industry itself, even when happening through the fault of the workman, treating it as an element in the cost of production to be added thereto, and hence borne by the community in general; and that the act should be construed liberally, and not strictly as a statute in derogation of the common law, and should receive as broad an interpretation as can fairly be given it, cannot be questioned." *Moore v. Lehigh Valley Railroad Co.*, 169 App. Div. 186, 187, July 1, 1915.

The Court of Appeals has affirmed the Appellate Division in the *Moore* case (217 N. Y. 627). Speaking of a certain construction in the case of *Costello v. Taylor*, 217 N. Y. 179, it has said, "Such a construction would be narrow and restricted and not in accordance with the spirit of the act." When, with cited array of precedents, appellants in *Matter of Petrie* argued that "the Workmen's Compensation Law being in derogation of the common law should be strictly construed" and respondent argued that it "should receive a broad and liberal construction in favor of the employee," the Court of Appeals decided in favor of respondents' view, Judge Hiscock saying:

"The Workmen's Compensation Law was adopted in deference to a widespread belief and demand that compensation should be awarded to workmen who were injured and disabled temporarily or permanently in the course of

their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law. The underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a workman from being deprived of means of support as the result of an injury received in the course of his employment. The statute was the expression of what was regarded by the legislature as a wise public policy concerning injured employees.

Under such circumstances we think that it is to be interpreted with fair liberality, to the end of securing the benefits which it was intended to accomplish." *Matter of Petrie*, 215 N. Y. 338, June 15, 1915.

*g. Two main view-points for the subject of coverage.*—The subject of coverage may be approached from opposite points, either from the question: How far does the law of negligence apply to accidental injuries? or from the question: How far does the law of compensation apply to accidental injuries? It is advantageous, if not necessary, to a complete consideration and grasp of the subject to approach it from both of these points and to classify the court and commission cases as they naturally fall under the one or the other of them. A third point is suggested by the question: How far are the law of negligence and the law of compensation mutually or alternatively applicable? This may be considered subordinately in connection with each of the other two. Accordingly, the first general view-point may be that of the residual application of the law of negligence.

#### B. Coverage from the View-Point of Employer's Liability.

*Three general classes of injuries.*—Applying the above mentioned principle that the law of negligence still holds in so far as the Workmen's Compensation Law does not take its place, the accidental injuries in which the law of negligence is still invocable fall into three general classes: (a) Injuries not arising out of or in the course of employment; (b) Injuries arising out of and in the course of employment, but in occupations not included within some one of the groups enumerated in Workmen's Compensation Law, § 2; (c) Injuries arising out of and in the course of employment in occupations included within some one of the groups enumerated in Workmen's Compensation Law, § 2, when certain contingencies are present.

a. *Injuries not arising out of and in the course of employment.*—Excluding injuries to property from consideration, the first of these three general classes may be subdivided into accidental injuries to (1) persons who are not employees; (2) employees during absence from duty; (3) employees, while on duty, but not incidental to their employment.

1. *Persons who are not employees — independent contractors.*—As under the law of negligence, so under the law of compensation, the courts have been called upon to distinguish between a contractor and an employee. The Workmen's Compensation Law makes no mention of contractors, subcontractors or independent contractors. It provides no remedy for an independent contractor injured while carrying on the work called for by his contract. In the two following cases the court decided that the claimants were entitled to compensation, in the Rheinwald case because Rheinwald was not an independent contractor but an employee, and in the Powley case because Powley was acting as a mere employee at the time of, and under the circumstances of, the accident, though an independent contractor in his main and ordinary relationship with the company from which he claimed compensation. Powley was doing dredging work with his own dredge boat under a contract with Vivian and Company. He received his injury, however, while operating a motor boat belonging to the company, on behalf of the company. An interesting aspect of the Rheinwald opinion, from beginning to end, is its denial of the sway of employers' liability precedents. "In determining who is an 'employee' within the meaning of the present law," said the court, "only decisions under this or similar acts based on the identical principle can be recognized as controlling, influential or even interesting." The full texts of the two decisions, together with the dissenting opinion in the Rheinwald case, are as follows:

*(Rheinwald decision).*

WOODWARD, J.: I am of the opinion that the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1913, chap. 816, as re-en. and amd. by Laws of 1914, chap. 41, and Laws of 1914, chap. 316), fairly construed and beneficially applied, gives right of compensation to the present claimant before the State Workmen's Compensation Commission. The work in which Robert Rheinwald, the claimant's husband, was engaged at the time of his death, the manner in which he was doing it, the circumstances under which

he came to be doing it, and the relations which his work bore to the business carried on by the respondent Builders' Brick and Supply Company, combine to bring within the scope of the statute his accidental and mortal injury in the course of that work, and entitle his widow and surviving children to the compensation which the law contemplates shall be paid to them when occupational mishap cuts off the wage earnings on which they were dependent for support. The Workmen's Compensation Law must in fairness be deemed to have been enacted in furtherance of a legislative determination, enforced by explicit mandate of the people through amendment of the State Constitution (Art. 1, § 19), that a new and different scheme and basis of indemnity for industrial accidents should be adopted in this State, in the light of the social experience of other Commonwealths and countries. Injuries sustained by those who perform the manual and mechanical tasks of an industry must be deemed to have been intended by this statute to be made a social risk, a liability of the industry, a charge upon the production cost of the article manufactured or the service rendered. Hitherto the rule of our statute and fundamental law had been that any right of recovery for industrial accidents must arise from a breach of the master's duty as to care and safeguards, and accordingly was limited by whatever contractual relation existed between the person injured and the person whose breach of duty was the efficient cause of injury. For this historic concept of liability springing from omission of legal duty created by contractual relation there has been substituted an application of the social principle that, regardless of duty and regardless of fault, the expenses and loss of earnings resultant from occupational injury to a workman engaged in carrying on an inherently hazardous business or avocation of an employer should be paid in the first instance by the employer and by him made a charge against the operating costs of the business. In place of the traditional juristic rule that the master must respond in damages when his servant is injured through the master's fault, and that otherwise the servant must go uncompensated and the loss be borne by him alone, the people and Legislature have now put in force the changed concept that the *trade product* should be charged with all consequences of inherent trade hazards, and that losses to individual workers through disability while engaged in the service of the proprietor of the business should be distributed among all its consumers or patrons, rather than left to operate ruinously against the disabled employee or the solitary employer. This mandate of the fundamental will of the people of this State should be remedially applied and beneficially enforced by the State Workmen's Compensation Commission and by the courts, in fair fulfillment of the legislative purpose, and ought not now to be hampered or crippled by continued application of definitions, concepts and rules of liability which indubitably produced in large part the very conditions of hardship for which the present statute was designed as comprehensive relief.

For these and consequent reasons, I am convinced that the learned majority of the State Workmen's Compensation Commission were in error in ruling that Robert Rheinwald was not, at the time of the injury which caused his death, an "employee" within the meaning of the Workmen's Compensation Law and a worker entitled to claim its benefits.

The facts of the present case are hardly controverted, but its issues are of vital importance to the efficiency of the plan of compensation created by the

statute and the extent to which its administration will be able to fulfill the purposes for which it was enacted. At or about noon on July 1, 1914, Robert Rheinwald, the husband of the claimant, was at work on a scaffold on one of the outside walls of a three-and-one-half story brick stable owned by the Builder's Brick and Supply Company at One Hundred and Seventy-second street and West Farms road, in the borough of The Bronx, city of New York. For ten years he had been by trade a painter, especially a painter of signs, and on July first he was at work repainting a large sign which he had himself painted on this building wall several years before. In some accidental manner not explained by the record, he slipped from the scaffold or it gave way, and he fell to the ground, received a fractured skull and other mortal injuries, and died a few minutes later. Several months before his death there had gone into effect in this State the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1913, chap. 816, as re-en. and amd. by Laws of 1914, chap. 41, and Laws of 1914, chap. 316), which declares (§ 2) that the "compensation" provided for therein "shall be *payable for injuries sustained or death incurred by employees engaged in the following hazardous employments*: \* \* \* Group 42. \* \* \* *painting*, \* \* \*." The statute further provides that "'employee' means a person who is engaged in a hazardous *employment* in the *service* of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his *employment* away from the plant of his *employer*, and shall not include farm laborers or domestic servants;" "employer" is defined to mean "a person \* \* \* corporation \* \* \* *employing workmen* in hazardous employments;" and "employment" is stated to include "employment only in a trade, business or occupation carried on by the employer for pecuniary gain." (§ 3, subds. 3, 4, 5.) The Builders' Brick and Supply Company, as its name indicates, was in the business of manufacturing and selling brick and other building materials, and the sign in question was one of its methods of advertising that business. Consequently it cannot be gainsaid that the painting or repainting of this sign would, if performed by an "employee," be a "hazardous employment;" that painting or repainting such a sign would, if performed by an "employee," be employment "in a \* \* \* business \* \* \* carried on by the employer for pecuniary gain," and that the death of an "employee" as the result of accidental injury in the course of such painting or repainting would entitle the widow and surviving children of the deceased to the compensation provided by the statute. (§ 3, subds. 7, 8.)

The Workmen's Compensation Law further provides that "every employer subject to the provisions of this chapter shall *pay or provide*, as required by this chapter, compensation according to the schedules of this article for the disability or death of his *employee* resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, *without regard to fault as a cause of such injury*." (§ 10.) The following section stipulates that "the liability prescribed by the last preceding section shall be exclusive," except that in the event an employer fails "to secure the payment of compensation for his injured employees and their dependents" by one of the three methods enumerated in section 50 of the act, the injured employee, or his legal representative in case death results from the injury, has the option of compensation under the act or suit at

law against an employer shorn of common-law defenses. (§ 11.) The defendant-respondent, the Builders' Brick and Supply Company, had, pursuant to subdivision 2 of section 50, secured the payment of compensation to its injured employees by insuring the same with the Fidelity and Deposit Company of Baltimore, Md., known under the provisions of the act as the "insurance carrier." (§ 54.) The Builders' Brick and Supply Company having thus "provided compensation" for its injured employees through securing the payment thereof by the insurance carrier, the claimant asserts her right to reimbursement thereunder.

Upon the death of Rheinwald while at work as a painter on the sign of the Builders' Brick and Supply Company, the notices required by statute (§ 18) were duly served in behalf of the widow and minor children, proofs of death were duly submitted, claim was made to the compensation provided for by the statute, the claim was duly brought for adjustment before the State Workmen's Compensation Commission, and testimony was taken at length. On August 31, 1914, the Commission handed down its findings of fact and conclusions of law adverse to the claimant's contentions, and rendered the following decision: That "the deceased was conducting an independent business, that the defendant had no control over the work, and that Rheinwald was an independent contractor and not an employee within the meaning of the Compensation Law." In this determination Chairman Dowling and Commissioners Darlington and Mosher concurred. Commissioners Wainwright and Mitchell filed a dissenting opinion, which expounded a contrary view upon the central issue in the case.

Section 23 of the act provides that "An award or decision of the Commission shall be final and conclusive upon all questions within its jurisdiction, as against the State fund or between the parties, unless, within thirty days after a copy of such award or decision has been sent to the parties, an appeal be taken to the Appellate Division of the Supreme Court of the Third Department. The Commission may also, in its discretion, where the claim for compensation was not made against the State fund, on the application of either party, certify to such Appellate Division of the Supreme Court, questions of law involved in its decision. Such appeals and the questions so certified shall be heard in a summary manner and shall have precedence over all other civil cases in such court." The claimant appealed from the Commission's adverse determination, and on October 5, 1914, the Commission, on the application of her counsel, passed a resolution certifying to this court "the following question of law involved in the decision of the State Workmen's Compensation Commission denying the claim for compensation in Claim No. 602, Robert Rheinwald, deceased: \* \* \* In view of the *evidence* in this case, was Rheinwald an *employee* within the meaning of the Workmen's Compensation Law?"

By the form of the question certified in the above quotation, of which the italics are mine, the Commission has asked this court for a ruling upon the basic question of law involved in the Commission's decision. The Commission made certain findings of fact, from which it reached the conclusion of law that Rheinwald was not an "employee" within the meaning of the Workmen's Compensation Law. Section 20 of the statute makes the decision of the Commission "final as to all questions of fact," but the Commission has certified the evidence taken before it, as well as its own findings of fact

therefrom, to aid this court in reaching a determination as to the correctness of the Commission's legal conclusion. The evidence taken before the Commission is, therefore, before this court to supplement, explain and illumine, but not to contradict or vary, the Commission's findings of fact, and in all cases the question of the correctness of the Commission's determination as to the applicability of the statute to the injury upon which the claim is based remains a question for judicial scrutiny, in the light of the facts as found by the Commission.

Examining the findings, then, in the light of the evidence, do they sustain the decision of a majority of the Commission that Robert Rheinwald was a so-called "independent contractor" and that he accordingly was not an "employee" within the meaning of the statute? He was a painter by trade, and had worked at this trade for many years. He often did signpainting, for the Builders' Brick and Supply Company and other concerns, but his work was by no means confined to signpainting. He did general painting "wherever he could get a job" and was "out of work," as testified, "some of the time." He had done all of the painting work which had been done for the Builders' Brick and Supply Company and its affiliated concern, the P. J. Heaney Company, for at least five years before his death. He had, on various occasions, painted for them a sign, a derrick, a fence, an automobile, an automobile truck, and similar work; and he did similar painting for other concerns as desired. Apparently he was usually paid according to a price agreed on in advance of the beginning of work, rather than by the day, although this does not clearly appear as to any piece of work except the signpainting. The Commission finds that Rheinwald *usually* performed the work personally, did not usually employ others on his job, and that he had not employed other painters in performing previous work for the Builders' Brick and Supply Company, except possibly upon one occasion. As to that wholly unidentified occasion, there was no definite or satisfactory evidence before the Commission, and no evidence whatever that on any other occasion he employed a helper while working for anybody or that he ever took any job on which he exercised any supervision or superintendence or did anything except personally perform the application of the materials and paint. He was working alone when the scaffold precipitated him to the ground, and was engaged in "doing over" a sign which he had personally painted several years before but which had not remained in condition satisfactory to the owner of the premises.

The Commission has found as a fact that "the previous work done [by Rheinwald] for the Builders' Brick and Supply Company had usually been done under oral agreement." The terms of previous employments or contracts do not appear in the record. "A written contract was asked for [by the Builders' Brick and Supply Company] in this instance," the Commission states, "because some work performed previously upon this sign had been unsatisfactory and because agreement was required that he use certain specified materials and make good for faults in the work," should any defects develop from specified causes within a period of four years. Accordingly, on June 30, 1914, he signed the following contract to do the work in the course of which he was injured one day later: "I agree to paint new signs on stable and north end of office, same size and wording and remove old paint and lettering on same, all for the sum of fifty dollars and hereby

guarantee all work to last in good shape for a period of four years from completion and agree to replace without charge any defects from chipping or poor material which may develop within that time. I agree to put on not less than two (2) coats of paint and it is hereby understood and agreed that should I use any materials than Atlantic White Lead, Linseed Oil, pure Turpentine, Chrome Yellow and Lamp Black, that I shall not require to be paid for any work or material. Work to be satisfactory to owner when completed."

Materials as well as tools for painting performed by him he usually supplied, as in this instance, and he kept these in the cellar of his home. As an aid in obtaining signpainting to do, he had letter stationery or billheads printed with his home address and the indorsement "Robert Rheinwald, Jr., Signs." It does not appear, however, that he ever sent out "bills" or statements for any work done. On at least one occasion he had done work for another signpainter in the neighborhood, but it does not appear that he had ever employed a signpainter or had the assistance of a signpainter in any work done by him. The evidence, as well as the findings, fully support the position of the dissenting members of the Commission, that Rheinwald "was of the grade of *workers*, and his work of the kind of work that this law contemplates." Of this there can hardly be doubt or denial. Rheinwald was *in fact* a *workingman*, engaged in doing, personally and exclusively, a *kind* of skilled manual labor which the Workmen's Compensation Law specifically covers, and as to which it clearly contemplates that those engaged therein shall not have to bear personally the inherent risks of their occupation or the burden of loss from accidental injury therein. The statute furthermore provides (§ 21) that in any proceeding for the enforcement of a claim for compensation thereunder "it shall be *presumed, in the absence of substantial evidence to the contrary*, \* \* \* that the claim comes within the provisions of" the act. That legislative presumption is, of course, as operative and binding in this court as in the Commission below. When a workman or his survivor asks compensation for occupational accident under the statute, the presumption is clear and sufficient, in the absence of substantial evidence to the contrary, that he was an "employee" within the meaning of the statute and is entitled to call into activity its machinery for the economic distribution of the loss occasioned by such injury among all patrons of the industry in which he was employed.

The majority of the Commission have, however, sustained the contention of the insurance carrier and the Builders' Brick and Supply Company that the widow and surviving children of the deceased painter are not entitled to the compensation provided in the Workmen's Compensation Law, on the ground that "the deceased was conducting an independent business, that the defendant had no control over the work, and that Rheinwald was an independent contractor, and not an employee within the meaning of the Compensation Law." No finding of fact, it will be noted, was made by the Commission that the respondent Builders' Brick and Supply Company had no control or supervision over the work being done by Rheinwald, and the question whether that conclusion and the parallel conclusion as to Rheinwald's status as an "independent contractor" were legally justified must be determined here in the light of the findings as explained and supplemented by the evidence certified to this court by the Commission.



The action of the majority of the Commission presents essentially two questions for scrutiny here. The first of these concerns the correctness of the contention of the respondents that Rheinwald was not a "workman" or "employee" but rather an "independent contractor," within the meaning and scope of the terms "workman" or "employee" as used in "master-and-servant" statutes or in common-law decisions applying familiar rules of the master's liability in negligence for injuries sustained by an employee. The second and more vital question addresses itself to the respondents' contention that decisions at common law or under "employers' liability" statutes, involving the question as to whom the master owes a duty of care and precaution arising out of the contractual relation of hiring, must be regarded as controlling now the determination as to who is an "employee" within the meaning of a statute enacted pursuant to the changed social purpose which I have indicated.

The first of these two questions hardly requires discussion at length, in view of the rule which I conceive should be followed in all interpretation of the Workmen's Compensation Law. The respondents contend, and the majority of the Commission below has in effect held, that Rheinwald was not a "servant," "workman" or "employee" at all for the reason that, irrespective of the grade of work he was doing or the way in which he was doing it, and irrespective of the relation which he and his work in fact bore to the business of the Builders' Brick and Supply Company, the *contractual* relation which he had assumed toward that company made him what must be regarded as an "independent contractor," as that term has been defined in negligence actions, at common law and under employer's liability statutes. The respondents contend that this contractual status as an "independent contractor" would, prior to the enactment of the Workmen's Compensation Law, have absolved the Builders' Brick and Supply Company from liability to him for negligent violation of the master's duty of care and precaution as to employees, and that under the new statute the same contractual status bars Rheinwald's widow and children from claiming any benefits from the insurance which the company provided for its employees, pursuant to section 50 of the act. The question whether Rheinwald was to be deemed an "independent contractor," within the meaning of statutes in force prior to the Workmen's Compensation Law, is a question unadjudicated in this State and not capable of so ready resolution as respondents' counsel has contended. Thompson, in his work on negligence (2d ed. § 622), says: "An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation representing the will of his employer, only as to the result of his work, and not as to the means by which it is accomplished."

Labatt, in his monumental compendium on Master and Servant (2d ed. § 64), says: "The accepted doctrine is that, in cases where the essential object of an agreement is the performance of work, the relation of master and servant will not be predicated, as between the party for whose benefit the work is to be done and the party who is to do the work, unless the former has retained the right to exercise control over the latter in respect to the manner in which the work is to be executed."

Shearman & Redfield, in the course of their volumes on the Law of Negligence, epitomize the familiar rule as follows: "Although, in general sense, every person who enters into a contract may be called a 'contractor,' yet that word, for want of a better one, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect of all its details. The true test of a 'contractor' would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the *result* of his work, and not as to the means by which it is accomplished. \* \* \* In actual affairs, an independent contractor generally pursues the business of contracting, enters into a contract with his employer to do a specified piece of work for a specific price, makes his own sub-contracts, employs, controls, pays and discharges his own employees, furnishes his own material, and directs and controls the execution of the work. Where these conditions concur, there is, of course, no difficulty in determining his character as such. It is only where one or more of them is lacking that a question arises. *The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work, and have the right to control the mode and manner of doing it.*" (1 S. & R. Neg. [6th ed.] § 164.)

Similar doctrine has been declared and applied, by courts of this State, in *Hopkins v. Empire Engineering Corporation* (152 App. Div. 570); *Schular v. Hudson River R. R. Co.* (38 Barb. 653); *Finkelstein v. Balkin* (103 N. Y. Supp. 99), and *People v. Orange County Road Const. Co.* (175 N. Y. 84); though it should be said that none of those decisions involved a state of facts analogous to that at bar. Rheinwald had no employees, made no sub-contracts, did the work personally in the first instance, and was engaged personally in "doing it over" when he was mortally injured. The decisive test of contractual status in an independent calling is often stated, under authorities such as those above quoted, to be whether the person doing the work is by the contract placed in the position of freedom from the orders and control of his employer, and a position of representing the employer's will only as to results, and not at all as to means, methods or manner of doing the work. Applying this test, is it clear under the findings and evidence at bar that Rheinwald was an "independent contractor" and not an "employee" even under statutes prior to the Workmen's Compensation Law? The Commission concludes that the employing company "had no control over the work," but, as I have pointed out, it made no finding of fact to that effect. The record itself clearly indicates that it was contemplated by both Rheinwald and his employer that he should and would do all the work personally; he had no assistants on whose labor he made a profit; he personally performed every detail of work for which he was paid; and the record indicates that both understood that full rights of control and direction were reserved to and ordinarily exercised by the employer on painting work performed by Rheinwald. For example, the record shows the following replies by the employer's president: "Q. Did you order him to paint your automobile truck or automobile? A. I did. \* \* \* Q. Are you around the brickyard? A. Most of the time. This is the only work he started I did not see. \* \* \* Q. Did you exercise any supervision whatever, Mr. Heamey, as

to the manner in which this work was being done? A. On this particular job I did not. I was not there when he started."

Courts of other States have increasingly taken an enlightened and common-sense view as to what circumstances spell out an independent calling, so as to relieve the employer from statutory or common-law duties of care and precaution (*Interstate Coal Co. v. Trivett*, 155 Ky. 795; *Employers' Indemnity Co. of Philadelphia v. Kelly Coal Co.*, 156 id. 74; *Waters v. Pioneer Fuel Co.*, 52 Minn. 474; *Chicago, R. I. & Pac. Ry. Co. v. Bennett*, 36 Okla. 358); and I have no doubt that the courts of this State would have similar regard for the actualities of modern industrial organization; in determining whether a manual laborer doing work wholly of the manual laborers' grade, had by contractual arrangement with his employer absolved the latter, intentionally or unintentionally, from liability for breach of the rules of care and safeguard long made obligatory by law.

The question, however, is not decisive, or hardly material, here. The "independent contractor" was one whose contractual relation with him for whom the work was being performed was such that the former could not fairly be heard to say that he had "assumed the risks" of the occupation, and in consequence could not complain that his employer owed him the full and usual duty of precaution. The "independent contractor" doctrine is thus part and parcel of the "fault" theory of *employers' liability*. The present question arises under the Workmen's Compensation Law, enacted to supersede the statutes and common-law principles whose terminology we have been discussing, enacted to carry out a legislative purpose that accidents sustained by those who do the work of an industry shall be borne by the industry and paid for by its patrons, and not left to fall harshly upon the disabled worker or his dependent widow and children. Therefore, at the outset, the rule must fairly be laid down that in determining who is an "employee" within the meaning of the present law only decisions under this or similar acts based on the identical principle, can be recognized as controlling, influential or even interesting. Furthermore, it must be predicated as a fundamental canon of the proper construction of the Workmen's Compensation Law that the statute is to be construed remedially and beneficially, with the view of carrying out fairly and fully the legislative purpose, and with the view to bringing within the purview and operation of the act all workers whose accidental injuries are inherent occupational risks, rather than with the view to excluding from the operation and protection of the act persons whose claims to its benefits fall fairly within the principle that disabilities to workers through trade mishaps should not be left to hang burdensomely on individuals who might thereby be forced into the class of dependents on public or private charity. A careful reading of the messages of successive Governors upon the subject, an examination of the exhaustive report prepared by the so-called Wainwright Commission of 1909, which drafted this State's first compensation law, an analysis of the decision of the Court of Appeals (*Ives v. South Buffalo R. Co.*, 201 N. Y. 271), holding that such a statute could not be put in force in this State without explicit amendment of the Constitution, combine to remove any doubt as to the legislative purpose to supersede "rules of law governing legal liability" which were stated by Governor Hughes, in his annual message to the Legislature of 1910, to "offend the common sense of fairness" and the purpose likewise

to carry out the recommendation of the Wainwright Commission that the State should "establish a new system of compensation for accidents to workmen." Careful perusal of the report of the Wainwright Commission further discloses that perhaps its chief social indictment of the existing system of employers' liability upon proof of his fault was that, as shown by authenticated tables of continental and American experience, forty to sixty per cent of accidents in industry were found to occur essentially without relation to legal fault, but were inherent in its normal course, and that if this loss were left to be borne wholly by persons of the grade of workers, their incomes from the industry have not ordinarily been sufficient to bear such a loss of earnings, with the result that the workers and their dependents became objects of charity, dependents of a society which had forced on them alone the onerous incidence of a burden which fairly belonged to society itself. The economic status of the worker and the income he has been deriving from his toil, therefore, became factors in determining whether the person disabled or killed was "of the grade of workers."

Was Rheinwald an "employee" in fairness and in fact within the meaning of the Workmen's Compensation Law? Was he of the grade and status of worker, rather than of the grade and status of independent enterpriser? I am of opinion that he was, and that such a holding is essential to effectuate the purpose of the act, in transmitting the burden of this bereavement from the scanty purse of this workingman's widow and children to all the patrons of the product or service furnished by his employer. The fact that he was to be paid a lump sum or "by the job" cannot be recognized as taking him out of the class of "employees." The fact that his contract to do the work was in writing is not decisive on that issue, or the fact that by it he made certain undertakings of satisfaction of the employer or replacement if the finished work did not endure an expected length of time. The fact that his employment by the respondent was casual or intermittent cannot deprive him of the status of employee, in the absence of explicit legislative pronouncement to that effect. The fact that he furnished tools or materials, or undertook to do a specified "job" or produce a given result, does not prevent his being in fact a workman, an "employee," within the purview of this statute. Common sense and regard for the actualities should be potent on this issue, rather than technical distinctions and elaborate refinements. Rheinwald really was a worker; the sum he received for his painting was in an economic sense wages, and not profits; he had no helpers, on whose work he made a profit; he was not an employer, with employees whom it was his duty to insure under the act; he personally performed all the work; it was contemplated by the employer that he would; and the employer had at least potential control, direction and supervision of all the work Rheinwald did at his trade for the respondent. The nature of the work Rheinwald was doing is far more influential on the present issue than any question as to the form of Rheinwald's contract of hiring, because the present law proceeds, not on the theory that an employer owes a legal duty to his employees, but that the industry and its patrons should assume the burdens of injuries sustained by the workers in the industry, as incidents of bringing into being its product or service. The law was intended for the protection of *workmen* and their families; it was intended to afford machinery by which

the burdens of injuries sustained by those who do the actual work of a business and are not themselves employers with a duty of insurance under the act, may be socially distributed and borne by society in general. The question is, what was the injured man doing, and what was his part in or relation to the actual work, rather than the question whether his contractual relation with the employer was such as to absolve the former from common-law duties of care for the safety of the worker. The question whether an injured worker was an "employee" within the meaning of the Workmen's Compensation Law is to be determined, in the first instance, by the Compensation Commission, under all of the facts of the particular case and the rules of construction herein laid down. Whether an injured worker was an "employee," under all of the facts surrounding his participation in the industry, remains a question of law for the consideration of this court, in the light of the facts as found by the Commission. In the case at bar, I am clear that Rheinwald was an "employee" within the meaning of the act.

The carefully considered opinions of the majority of the Industrial Accident Commission of the State of California in its very recent decision as to *Mrs. James Mason v. Western Metal Supply Co.* (not yet officially reported), are in accord with the views herein set out. The minority opinion in that tribunal is based upon apprehension of consequences against which the New York statute plainly guards, through the restriction of the term "employment" to "a trade, business or occupation carried on by the employer for pecuniary gain." (§ 3, subd. 5.) If it is deemed desirable further to withhold compensation from casual or occasional employees, as is done by the compensation acts of some States, that is a matter for the Legislature, not for court or commission. The expediency of such a limitation could not, even if established, be made a canon of construction of the existing statute or made a factor adverse to fair definition of its fundamental terms.

The question certified is answered in the affirmative; the decision is reversed and the claim and the proceeding are remanded to the Commission, with instructions to proceed to the computation and allowance of the claimant's recovery under the statute.

All concurred, except LYON, J., dissenting in opinion, in which HOWARD, J., concurred.

LYON, J. (dissenting):

I cannot concur in the conclusion reached in the foregoing opinion that Rheinwald was an employee and not an independent contractor. The contract under which the work was done was in writing, and by it Rheinwald agreed to paint signs on stable, office, and shed for fifty dollars, and to replace, without charge, any defects which might appear within four years, and that should he use any materials other than those specified in the contract he should not be paid for any work or material; the work to be satisfactory to the owner when completed.

Rheinwald had done other job painting for the supply company, and on at least one previous occasion had performed the same kind of work for that company, for which he had been paid by the job, and which had not proved as lasting as it should have proven, hence the guaranty in the last contract. Rheinwald furnished his own paints and painting tools, which he kept in the cellar of his house; he used printed billheads on which his name, the word "Signs" and his place of residence were given; he employed his

own capital; had the benefit of the profits from his work; did his work on his own time and whenever and in the manner in which he saw fit; was free under his contract to employ assistants in the work or do it alone as he wished, and in doing it was wholly exempt from any right whatever upon the part of the supply company to supervise its execution. In fact, Rheinwald was his own master, and was in no way whatever subject to the direction or control of the supply company, which was not engaged in the painting business but was a dealer in brick.

Appellant's counsel conceded upon the hearing before the Commission that in case Rheinwald had assistants upon the work "that would take him out of the act absolutely—then he would become an independent contractor." While, perhaps, such concession is not controlling, nothing whatever in the contract, directly or impliedly, prevented his hiring assistants to work upon the job, as before suggested. It also appears, from the following testimony given upon the hearing before the Commission, that this employment was not considered by the respondents as a subject of insurance: "Q. [By Commission] Is that included in the pay-roll submitted to the insurance company? A. It was not. Q. They did not pay that in insuring themselves? A. No." While, perhaps, what the respondents may have considered is not material upon the question of the liability of the respondents, it answers the suggestion that the insurance company, having been paid for carrying the risk, ought not now in fairness to question its liability.

While I fully concur in very much of what my learned associate has so well and ably said in the prevailing opinion as to the beneficent intent of the Workmen's Compensation Law, and to the effect that it should be liberally construed to effectuate the purpose for which it was created, I cannot agree with him, in view of the evidence which was given before the Commission, that Rheinwald was an employee within the statute, but am forced to the conclusion that Rheinwald was an independent contractor, and hence that the majority decision of the Compensation Commission to that effect was correct and should be affirmed.

HOWARD, J., concurred.

Question certified answered in the affirmative; decision reversed, and the claim and the proceeding remanded to the Workmen's Compensation Commission, with instructions to proceed to the computation and allowance of the claimant's recovery under the statute. *Rheinwald v. Builders' Brick & Supply Co.*, 168 App. Div. 425, May 14, 1915.\*

(*Powley decision.*)

LYON, J.: The single question for determination upon this appeal is whether the claimant at the time he was injured was an employee of the defendant, Vivian & Co., Inc., within the meaning of the Workmen's Compensation Law, or was an independent contractor. Vivian & Co., Inc., hereinafter mentioned as Vivian Co., was engaged, under a contract with one Coen, in dredging waters at Oyster Bay, N. Y., for which service it was to be paid for the quantity of sand and gravel removed. It was the owner of

\* In accordance with the court's instructions the Commission made an award to the widow and daughters of Rheinwald (S. D. R. vol. 7, p. 440, Feb. 16, 1916). The employer appealed therefrom to the Appellate Division which reversed the award and its own former opinion on authority of the intervening decision of the Court of Appeals in *Bargey v. Massaro Macaroni Co.*, below, p. 189. The reversal was without opinion: 174 App. Div. 935.

scows within which to dump and carry away the material dredged. The claimant was the owner of a dredging machine and appurtenances, and of the cooking, culinary and commissary equipment thereof.

In July, 1914, the claimant and Vivian Co. entered into an agreement in writing by which the claimant agreed to furnish his dredge with its equipment and appurtenances in good working order to Vivian Co., for the use of Vivian Co. in its dredging operations during the continuance of an assigned contract between Vivian Co. and Coen, such lease of said dredge under the terms of the agreement not to extend beyond three years, the claimant further agreeing to turn over and deliver to Vivian Co. all the cooking, culinary and commissary department and equipment thereof then on the dredge for the use of Vivian Co. during the dredging operations. The agreement further provided that Vivian Co. was to pay the claimant for the use of the dredge and commissary department, and for the services of the claimant (or of such competent man as he might select to take his place in charge of said dredge and the crew thereof), the sum of \$500 per month; in addition thereto to pay the claimant three cents per cubic yard for all yardage delivered on scows in excess of 20,000 cubic yards per month from the dredging operations of Vivian Co. under the Coen contract, and in determining such yardage the measurements of the sand and gravel dredged under the Coen contract for which Vivian Co. received payment were to be the standard on which such compensation, if any, should be paid by Vivian Co. to the claimant. Vivian Co. was to furnish a monthly report of the dredged material removed, payment for the rental and any yardage to be made every month. The claimant was to pay for all machinery repairs and new parts which might be required from time to time for the dredge. Vivian Co. was to pay the wages of the crew, expenses of the commissary department or the board of the crew and for all fuel, oil and operating expenses of every kind. The agreement by clause 7 provided that "the dredge is to be operated for the benefit of the party of the second part [Vivian Co.] under the management of the said party of the first part or some competent person selected by him and satisfactory to the said party of the second part;" by clause 8 that Vivian Co. "is not to use any other dredging plant on the said work so long as the said dredge and equipment of the said party of the first part is sufficient to dredge and furnish the quantity of material required by the terms of the said Coen contract;" by clause 9, that "neither party hereto shall be liable or answerable in any way for any loss or damage suffered or sustained by the other, or by third parties in their person or property, through the fault, neglect or omission of the other party hereto, or his or its servants or agents;" and finally that "this agreement is to be binding upon and for the benefit of the heirs, executors, administrators, successors and assigns of the respective parties hereto." In accordance with this agreement, the claimant furnished the dredge with its equipment, together with the personal property mentioned in the agreement, and the performance of the work specified in the Coen contract was entered upon. Following the injury to claimant, the management of the operation of the dredge was continued by a person employed by the claimant.

For use in connection with the dredging operations was a motor launch of which Vivian Co. was the lessee from some person other than the claimant, which was used in carrying the men and supplies between the shore and the

dredge, and was used generally wherever needed in connection with the dredging operations. In September, 1914, the claimant, in order to crank the motor, took hold of the cranking handle upon the fly wheel. The motor backfired and the handle struck the claimant, breaking his right arm at the wrist. This is the injury for which compensation is sought.

The Workmen's Compensation Commission found as conclusions of fact that on the day the claimant received his injuries he was employed by Vivian Co. as an operator of a dredging machine; that on said date while claimant was attempting to start a motor on a motor boat which was operated in connection with the dredge, the motor backfired and broke his right wrist; that such injuries were accidental injuries and arose out of and in the course of his employment, and that the claim came within the provisions of the Workmen's Compensation Law. The Commission, having fixed the average weekly wages of claimant at twenty-six dollars and fifty-four cents, made an award to him of fifteen dollars per week for six weeks beginning at the expiration of two weeks from the happening of the injury. From such award this appeal has been taken by both the employer and the insurer.

Manifestly the first question to be considered is whether under the agreement the claimant was an employee or an independent contractor. Section 3 of the Workmen's Compensation Law (Consol. Laws, chap. 87; Laws of 1913, chap. 816, as re-enacted and amd. by Laws of 1914, chap. 41, and amd. by Laws of 1914, chap. 316) defines the term "employer" as used in the act as " \* \* \* a \* \* \* corporation \* \* \* employing workmen in hazardous employments," and defines the term "employee" as " \* \* \* a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same \* \* \* ". An independent contractor is defined as one who exercises an independent employment and contracts to do a piece of work according to his own method and without being subject to the control of his employer, save as to the results of his work. (*Alexander v. Sherman's Sons Co.*, 86 Conn. 292.) The true test of a contractor would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it. (*S. & R. Neg.* [6th ed.] § 164; *Hesamer v. Webb*, 101 N. Y. 377, 385; *Cunningham v. International R. Co.*, 61 Tex. 503; *Andrews v. Boedecker*, 17 Ill. App. 213.) An independent contractor is not in any legal sense a servant of his employer, but is one exercising an independent employment under a contract to do certain work by his own methods without subjection to the control of his employer except as to the product or result of the work. (*Indiana Iron Co. v. Cray*, 19 Ind. App. 565. To the same effect, *Parrott v. Chicago Great Western Ry. Co.*, 127 Iowa, 419; *Williams v. National Cash Register Co.*, 157 Ky. 36; *Wood Mast. & Serv.* § 424; *Thomp. Neg.* [2d ed.] § 622.)

While frequently it is difficult to distinguish between the position of servant, and that of a person exercising an independent calling, the evidence in this case strongly tends to relieve the uncertainty. The claimant was a contractor of twenty years' experience in dredging operations, and concededly thoroughly competent to manage the operation of a dredge. While he was



required to bear the expense of necessary repairs and new parts to the machinery, he had no power to hire or discharge a man, and paid no part of the dredging expenses. Vivian Co. paid the wages of the crew, the expenses of the commissary department or the board of the crew, and for all fuel, oil and operating expenses of every kind. That the relation of the claimant to Vivian Co. in hiring out with his dredge was that of a person exercising an independent calling and not that of a mere employee is manifest throughout the agreement. This is particularly apparent from the clauses before quoted, by which no right of control of the management of the operation of the dredge was vested in Vivian Co., but was vested wholly in the claimant or in his substitute; that Vivian Co. should use no other dredge so long as the claimant's dredge was able to do the work required by the Coen contract; that neither party should be liable to the other or to third parties for the negligent acts or omissions of the other, and that the obligations and benefits of the agreement should be binding upon, and extend to the heirs, representatives and assigns of the respective parties, thus apparently recognizing the right of either party to voluntarily dispose of his or its interest in the contract, and providing for its continuance in that event, or in the event of the death of the claimant. The fact that Vivian Co. may from time to time have directed the particular places at which the sand and gravel should be taken out was in no way inconsistent with the claimant's relation being that of an independent contractor. "The mere fact of direction as to things to be done, without control over the methods or means of doing them, does not make a contractor a servant." (S. & R. Neg. § 164.) The mere fact that a person hiring a livery team may direct the driver where to go and at what speed does not create the relation of master and servant. (*Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 197.) The provisions of the agreement and the acts of the parties under it, as disclosed by the record, are consistent only with the relation of the claimant being that of a person exercising an independent calling. To that relation by itself the Workmen's Compensation Law does not apply. However, at the time of sustaining the injury the claimant was not engaged in the specific work of managing the operation of the dredge. He was necessarily, he says, transporting supplies to the dredge when he sustained the injury. Vivian Co. was obligated by the agreement to furnish these supplies. The launchman was its employee, and it was its duty to furnish a man to run the launch. In performing that duty Vivian Co. failed, and as the claimant says, "I had to get the supplies myself." In the performance of that act the claimant is to be regarded, not as an independent contractor, but as an employee, within the intent of the Workmen's Compensation Law.

"One who has an independent business, and generally serves only in the capacity of a contractor, may abandon that character for a time, and become a mere servant or agent, and this, too, without doing work of a different nature from that to which he is accustomed. \* \* \* And he may even be a contractor as to part of his service, and a servant as to part." (S. & R. Neg. [6th ed.] § 165.) Where an independent contractor had finished a building, it was held that in throwing waste material from the roof he was acting as a servant of the owner. (*Swart v. Justh*, 24 App. D. C. 596.)

The provision in the agreement by which each party exempted the other from all acts of fault or omission, even if in terms applicable to a claim of

this character, would be wholly ineffective. An agreement by an employee to waive his right to compensation under the Workmen's Compensation Law is not only void as against public policy, but also under the express provision of section 32 of that act.

The defendants did not see fit to offer any explanatory evidence whatever upon the hearing before the Commission. The presumption, in the absence of substantial evidence to the contrary, is that the claim comes within the provisions of the Workmen's Compensation Law (§ 21). The evidence is meagre, but upon it the Commission has found as a conclusion of fact that the injuries to the claimant were accidental, and arose out of and in the course of his employment. With such conclusion, which by the Workmen's Compensation Law (§ 20) is made final as to all questions of fact, I think we should not interfere. The award should, therefore, be affirmed. All concurred, except HOWARD, J., dissenting. Award affirmed. *Powley v. Vivian & Co.*, 169 App. Div. 170, July 1, 1915.

2. *Injuries of employees during absence from duty.*—The Workmen's Compensation Law does not apply to employees continuously. It ceases to protect workmen and the law of negligence takes its place during such periods as they may not be at work. If employer and employee, for health or pleasure, are operating each his own motor vehicle on a highway and the employer injures the employee in a collision, the employee's only remedy is an action for negligence. The accidental injuries for which workmen receive compensation must arise out of and in the course of their employment (Workmen's Compensation Law, § 3, subds. 4, 7; § 10). Here the Workmen's Compensation Commission and its successor, the State Industrial Commission, have had to decide legal controversies. Just where and when, as a man quits work at night, or comes to work in the morning, does his employment cease or begin? What of lunch intervals and other pauses in his work?

The question is an old and well-settled one under the law of negligence. The two cases following appear to be the only ones involving the point in which the courts have thus far reversed a commission award under the Workmen's Compensation Law.

The Workmen's Compensation Commission decided that the dependents of a street railway motorman who, having finished his day's run, was mortally injured by an automobile while hurrying from the car barn to catch one of the company's cars to the city to get his watch tested in accordance with the company's rules, was entitled to compensation. The Appellate Division, in reversing this award, pointed out that the employee had ceased his

hazardous occupation of motorman, had signed his name to the register as indicative that his day's work was over, had passed out of the car barn and had reached the middle of the public highway when he was struck by the automobile. The court said that the immediate errand upon which he was bent, having his watch tested in accordance with the company's rules, was not an incident but a condition of his employment. The decision in full is as follows:

WOODWARD, J.: While the evidence before the Commission that the deceased was on his way to have his watch inspected, under the provisions of the employer's rule, is meagre and uncertain, we will assume the facts, for the purposes of this appeal, to be as found by the Commission. The findings are that "at the time of receiving the injuries resulting in his death Edward De Voe resided at Mohawk, Herkimer county, State of New York, and was employed as a motorman by the New York State Railways, a street railway corporation.

"2. On September 12th, 1914, at about 4:50 P. M., and after deceased had finished his work for the day, and as deceased was hurrying from the car barn at Mohawk to catch a car of the New York State Railways, which was just coming to a stop before the car barn, deceased was struck by an automobile running near the curb, receiving injuries from which he died three days later. The purpose of the deceased in taking or attempting to take a car was to proceed to Herkimer to have his watch tested. It was understood when employees were hired that they should have free transportation on the cars of the company. It was a rule of the company (employer) that the men must have their watches tested once in every two weeks under penalty of loss of one day. The employees were not paid for the time which they consumed in the period of testing watches or of going to and from the place where the test might be made. The person who made the tests was designated and paid by the employer.

"3. The injury received by the deceased was an accidental injury arising out of and in the course of his employment and resulted in his death," etc.

The conclusion of law is reached that the "claim comes within the provisions of chapter 67 of the Consolidated Laws, being chapter 816 of the Laws of 1913, as re-enacted and amended by chapter 41 of the Laws of 1914, and amended by chapter 316 of the Laws of 1914, known as the Workmen's Compensation Law."

The employer, which is its own insurance carrier, appeals from the award, and, while contending that the facts found are not supported by the evidence, in so far as they relate to the deceased's intention in running to the car, urges that the conclusion of law is erroneous. This, it seems to us, is the only question requiring consideration. Is the claim within the provisions of the statute? The conclusion of fact, which is a mixed question of law and fact, that "the injury received by the deceased was an accidental injury arising out of and in the course of his employment and resulted in his death," is not conclusive upon this point. While the statute is of a remedial character and is to have a liberal construction, no doubt, for the purpose for which it is designed, it is not to be extended by implication to accidents not

clearly within the language of the act. It is true, of course, that section 10 of the act provides that "every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury," but this is not the controlling provision of the act. The Legislature has not attempted to impose upon employers the obligation of insuring their employees generally against accident. The language of section 2 of the act, which is the controlling section, declares that the "compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments." It covers, not employees generally, even of the particular groups, but "employees engaged in the following hazardous employments," and among these are "Group 1," which is "the operation, including construction and repair, of railways operated by steam, electric or other motive power, street railways, and incline railways, but not their construction when constructed by any person other than the company which owns or operates the railway, including work of express, sleeping, parlor and dining car employees on railway trains." The insurance is not of the employee, while engaged in the service of the master in employments other than hazardous; the employee of a street railway, for instance, who is engaged in bookkeeping, or in running errands or doing other work disconnected with the physical operation of the railroad, would not be "engaged in the following hazardous employments," nor would he be entitled to compensation, though the accident might be said to have arisen "out of and in the course of his employment." The question is, not whether he was employed by a street railroad corporation, but whether he was "engaged in the following hazardous employments." If he was not engaged in "the operation \* \* \* of railways operated by steam, electric or other motive power, street railways," etc., he is not within the letter or the spirit of the statute, even though his employer be a street railway corporation and he is injured while in that employment. The crucial question at all times is whether he is engaged in the hazardous employments mentioned in the statute, for it was only as to these that the Legislature has required the employer to provide compensation. That we are right in this is evidenced by the definitions to be found in section 3 of the act. "Hazardous employment" is defined to be "a work or occupation described in section two of this chapter" and the group to which the deceased belonged included only the operation of the street railway. It covered his employment while "engaged" in the work of a motorman in the operation of the street railroad, but when he ceased to be engaged in the hazardous employment and went out into the highway for the purpose of becoming a passenger in one of the employer's cars, the latter owed him no duty of insurance, any more than it owed it to any other citizen lawfully using the highway.

Assuming that the deceased was about to go to have his watch tested, and that he was still in the employ of the corporation for that purpose, the occupation was not of a hazardous nature as defined by the statute, or as understood in the common experiences of mankind. The statute was intended to protect the motorman and the conductor and the men engaged in the physical operation of an essentially hazardous employment, while engaged in such

employment, and when the person employed ceased to be engaged in the hazardous employment he came within the ordinary operation of law. It is conceded here that he had closed his day's work and had signed his name to the register denoting that fact, and had reached a point in the public highway where he was run down, not by any street railroad car, or by anything over which the employer had control, but by an automobile in the control, presumably, of some third person. He was not, therefore, in the employ of the New York State Railways within the language or intent of the statute. An "employee" is defined by subdivision 4 of section 3 of the act as "a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants." It is the fact of being engaged in the hazardous employment which gives the right to compensation, and not the fact that the employer is "carrying on or conducting the same," and that the employee is injured while performing some incidental duty in connection with such employment. "Injury" and "personal injury" are defined to "mean only accidental injuries arising out of and in the course of employment" (§ 3, subd. 7), and it certainly cannot be said that being run down by an automobile in a public highway, after the day's work has been completed, is an "accidental" injury "arising out of \* \* \* [the] employment." It had no relation whatever to the employment; it happened "away from the plant of his employer" and at a time when he was not engaged in any hazardous employment. It did not arise out of the employment in any proper sense. He was through with his day's work. He had left the plant of the employer and was in the public highway, and was not engaged in any occupation defined by section 2 of the act here under consideration. At most he was doing an errand for the employer which involved no hazard against which the employer was bound to insure him; he was about to take a public conveyance to carry him to a nearby village to have his watch regulated, and he was run down and injured by a passing automobile. He was not going to the car for the purpose of operating it; he was going to it in the relation of a passenger and for this purpose he was using the public highway, and there is no provision of law calling upon an employer to insure his employees against accidents produced by third parties in the streets. An accident "arising out of and in the course of employment" of the deceased would be an accident arising out of his employment as a motor-man in the operation of a street railroad car while actually engaged in such hazardous employment. The contract of insurance, under the statute, was to protect the deceased against accidents arising out of and in the course of the hazardous employment in which he was engaged, and the accident did not result from anything which occurred in reference to such employment but from the action of a third person lawfully using the public highway in common with the deceased.

He was not an "employee" within the definition because he was not at the time of the accident "engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant." He was not engaged in any service of the employer whatever. Assuming that he was intending to go to Herkimer to have his watch tested, he was not employed

for this purpose; it was merely a condition on which he was employed at all that he should have his watch tested at intervals of two weeks, just as the employer might have it a condition that he should have his hair cut or his nails manicured at stated intervals. He had completed his day's work. What he did after that might have some bearing upon his work in the future; it might be necessary to insure his right to work on the morrow, but it was no part of the employment for that day. It was not an incident of the employment but a condition of the employment. The master had a perfect right to say that it would not employ any one who did not have his watch tested every two weeks, and the fact that the employer paid for having the test made does not alter the case in the least. The employer might refuse to employ any one who did not have a watch, and it would have a right to insist that the man furnishing his own watch should have it properly regulated as a condition of the contract of employment, just as the employee has a right to exact in addition to his cash payment the privilege of riding upon the employer's cars, but none of these affect the question of the duty of the employer to furnish insurance against accidents happening outside of the employment. This accident no more arose out of the employment of the deceased as a motorman than it arose out of his residence in Mohawk. He would not have been injured if he had not been at the particular point where he was hit, and he might not have been at this point if he had not been employed by the New York State Railways, but these are matters for general insurance, not for occupational insurance forced upon the employer by the State, where the statute has not provided for the same. The evidence is that the deceased had closed his day's work and made his report of his time in writing, on which his wages were based, and that he had passed out of the employer's barn and had reached the middle of the street when he was struck by a passing automobile, and if the master is liable here he must be so because of a general insurance liability; it cannot be under the terms of the Workmen's Compensation Law. He was not employed to have his watch tested; it was necessary to the contract of employment that he should have such test made. His employment was that of a motorman, and any accident arising out of such employment, while engaged therein, comes within the provisions of the statute. But when he delivered over his car, signed his record, and passed out into the street, he was no longer engaged in the hazardous employments mentioned in the statute, and he took the risks which any other citizen takes in going upon the public highways. The State has not yet required the employer to become a general insurer of the lives of its employees; it has simply required that they be protected while engaged in the performance of certain hazardous employments.

The award should be vacated and set aside.

KELLOGG, J., concurred in result in an opinion in which LYON, J., concurred; SMITH, P. J., and HOWARD, J., dissented.

KELLOGG, J. (concurring in result):

I do not think the intestate received his injury while performing any part of his duty as an employee of the appellant. If the prevailing opinion means that there could be no liability unless the deceased met his death while actually operating his car as a motorman I cannot agree with it. I think that while he was performing any service for the master connected with and growing out of his employment, and a part of his duties as such employee, it is immaterial

whether he was actually operating his motor at the time. Having his watch tested was not a part of his service to the master. He was simply performing a condition which it was necessary for him to perform to qualify him to remain in the employment. I, therefore, concur in the result. LYON, J., concurred. Award reversed. *De Voe v. N. Y. State Rys.*, 169 App. Div. 472, Sept. 15, 1915.

In affirming the Appellate Division's decision in the DeVoe case, the Court of Appeals said:

POUND, J.: At the time of receiving the injuries resulting in his death Edward De Voe resided at Mohawk, and was employed as a motorman by the New York State Railways, a street railway corporation.

On September 12, 1914, at about 4:50 P. M., and after he had finished his work for the day, and as he was hurrying from the car barn at Mohawk to catch a car of the New York State Railways, which was just coming to a stop before the car barn, he was struck by an automobile running near the curb, receiving injuries from which he died three days later. The purpose of De Voe in taking or attempting to take a car was to proceed to Herkimer to have his watch tested. It was understood when employees were hired that they should have free transportation on the cars of the company. It was a rule of the company (employer) that the men should have their watches tested once in every two weeks, under penalty of loss of one day. The employees were not paid for the time which they consumed in the period of testing their watches, or of going to or from the place the test might be made. The person who made the test was designated and paid by the employer.

The question is whether death resulted from "an accidental personal injury sustained by the employee arising out of and in the course of his employment." (W. C. L. § 10, Cons. Laws, ch. 67.) The employee is not insured generally against accident while working for the street railway corporation. At home or on the street he may meet with accident not arising out of or in the course of his employment. The act does not cover such cases. The employee gets up in the morning, dresses himself and goes to work because of his employment, yet if he meets with an accident before coming to the employers' premises or his place of work that is not a risk of his occupation but of life generally. Deceased was not employed to have his watch regulated and therefore was not injured while doing a duty that he was employed to perform. He was not injured while on duty nor in his working hours nor on his way to or from his duty within the precincts of the company.

The order appealed from should be affirmed, with costs against the industrial commission. HISCOCK, CHASE, CUDDEBACK, HOGAN and CARDOZO, JJ., concur; WILLARD BARTLETT, Ch. J., dissents. Order affirmed. *De Voe v. N. Y. State Rys.*, 218 N. Y. 318, June 6, 1916.

A conductor returning to work on one of his employer's street cars was struck and killed by a passing car upon alighting at the car depot. The Appellate Division reversed an award of the Commission and dismissed the claim: *McCabe v. Brooklyn Heights*

*R. R. Co.*, S. D. R., vol. 8, p. 407; — App. Div. —, January 9, 1917.

In the following case the employee hailed a boat of his employer to take him off to the dredge upon which he was living and working but, being in an intoxicated condition, fell into the water before the boat reached him. He was drowned. In reversing an award of compensation the court drew a distinction between falling from the wharf and falling from the boat. The decision is as follows:

COCHRANE, J.: The facts in this case as found by the Commission are as follows: "On April 22, 1915, the day when Albert Berg received the injuries which resulted in his death, he was employed as a craneman on a dredge located in the Hudson River, at Troy, New York, which dredge was owned and operated by the Great Lakes Dredge & Dock Company, a corporation engaged in the business of dredging the Hudson River at that place. The dredge worked continuously twenty-four hours a day, and Berg and another crane-man usually worked on twelve-hour shifts. Under his contract of employment, Berg was furnished living quarters on the dredge and did live there. The employer furnished a boat to take the men to and from the dredge and from the shore. During the afternoon of April 21st, 1915, Berg obtained permission from the man in charge of the dredge to go ashore to have a check cashed, and went ashore in the company's boat. At about 4 o'clock in the morning of April 22nd, Berg hailed the dredge from the dock along the shore, which was the customary place for the men to come to take the boat out to the dredge. A boat was sent from the dredge to the shore, but the person rowing the boat failed to find Berg and started to return to the dredge, when a call was again heard from the dock, and the boat returned to the dock. The man rowing the boat then noticed Berg in the water going under a drillboat, which was located near by and a tug of the employer attempted to rescue him without avail. Berg was drowned and his body was recovered from the river two days later at about a mile downstream."

It further appears by the uncontradicted testimony of disinterested witnesses that Berg was intoxicated. He had been spending the night in a saloon in Troy from about eight-thirty o'clock in the evening until three-thirty o'clock in the morning or half an hour before he fell in the river. The last person who saw him before the accident, so far as the evidence discloses, states that he was then at the corner of River and State streets, and in the language of the witness, "staggering drunk," just having left the saloon where he had been since early in the previous evening. But the Commission has found that the accident "was not occasioned solely by the intoxication of the injured employee while on duty."

We think, however, that the injury did not arise out of and in the course of the employment of the deceased (Workmen's Compensation Law, § 10), and that the facts as found by the Commission and the uncontradicted evidence conclusively overcome the presumption created by section 21 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), that the claim comes within the provisions of that law. Berg went ashore on the



previous evening entirely for purposes of his own. No duty to his employer required him to leave the dredge or to remain away therefrom. His only business was to have a check cashed for himself, and the evidence is clear and undisputed that he passed the greater part of the night in personal amusement and entertainment. If he had fallen overboard from the boat which was conveying him from the dock to the dredge a different question would be presented. But he fell from the dock when there was no boat present, and he was consequently not even attempting to get aboard the boat of his employer which was used to convey the workmen from the dock to the dredge. The dock or place where he fell into the water was not owned or controlled by the employer. In no sense, therefore, had Berg reached the premises of his employer. The case is no different in principle from what it would be if Berg had received an injury in the streets of the city on his way to the river just before he fell therein. It does not change the case that he lived on the dredge. The controlling fact is that he had been ashore solely for purposes of his own and lost his life before he returned to his place of employment or to the premises of his employer and before he had gained access to the boat which was to carry him from the dock to the dredge.

This case is essentially different from the English case of *Moore v. Manchester Liners* (3 B. W. C. C. 527), relied on by the learned Attorney-General. In that case a seaman went ashore for the purpose of obtaining for himself necessities not provided by the owners of the ship. On returning to the ship he fell from a ladder which was the only means of access from the dock to the ship. It was held by the House of Lords that the accident arose out of and in the course of his employment. The present case would be more analogous if Berg had fallen from the small boat used by his employer to give him access from the dock to the dredge. But, as we have seen, that boat was not present and he was not, therefore, even attempting to get aboard the same. Furthermore in the case cited the employment of the injured workman was continuous and not intermittent and he was deemed in a certain sense to have been about his master's business in obtaining for himself necessary articles not provided by his employers. In the present case Berg's service was intermittent and would not begin until six o'clock in the morning and in no proper sense can it be considered that he was promoting or accomplishing his master's business while he was ashore.

The award should be reversed and the proceeding remitted to the Commission for further action. All concurred. Award reversed and matter remitted to the Commission for further action. *Berg v. Great Lakes Dredge & Dock Co.*, 173 App. Div. 82, May 3, 1916.

Certain awards denied by the Commission involve the point. A young woman started home from her employer's works, mailed some letters for the company and was struck by a train while crossing a railway track. The Workmen's Compensation Commission held that her employment ceased when she had mailed the letters and that she furthermore had no claim for compensation because the mailing of the letters had not caused her to

change her homeward route. (*Pogue v. Nassau Light and Power Co.*, S. D. R., vol. 1, p. 429.) An employee, starting from his employer's plant, quitted a private road to go along a railroad track and was run down by a train. In denying compensation to his widow, Commissioner Lyon said:

The general rule undoubtedly is, that an employee who has finished his work is under the act, until he has completely left the plant, or, at least, has had sufficient time to leave it and come upon a public highway or upon a place entirely disassociated from the plant. When he has so left the plant, unless he is still upon some errand or duty for his employer, he is no longer covered by the act.

Under this rule, if Mr. Hotaling had kept to the private road and had been killed before he reached the public highway, no doubt his widow would be entitled to compensation.

In that case he would have been, constructively at least, still upon his employers' plant; but, when he left the private road, and, for some reason of his own, went upon the tracks of the railroad, a third party, he lost the protection of the statute and the widow can no more claim compensation than as though he had been killed upon the public highway on his way home. *Hotaling v. Standard Oil Co. of N. Y.*, S. D. R., vol. 6, p. 308, Sept. 30, 1915.

A longshoreman, losing an eye in a scuffle during the noon hour, was denied compensation, because at the time of the accident he was outside his employer's gate and his ticket had not been punched in acceptance of his services for the afternoon. (*Sokol v. Clyde Steamship Co.*, S. D. R., vol. 6, p. 339.) Further consideration of the question is given below on page 195 under the heading, "Injury while coming to or leaving work."

3. *Accidents to employees, while on duty, but not incidental to their employment.*—The application of the Workmen's Compensation Law of New York is limited to injuries "arising out of and in the course of" employment (§ 3, subd. 7; §10). The phrase is derived by American workmen's compensation laws from the English Workmen's Compensation Act. Various accidents have raised the questions that it involves and subjected it to judicial interpretation. English cases are cited in American decisions. The phrase is conjunctive. An injury may occur "in the course of" an employment and yet not "arise out of" the employment. This question of incidentalness calls for a study both of the cases following in this connection and of the cases appearing below, pp. 182-221 under the heading, "The

injury is incidental to the hazardous employment." The amendment of L. 1916, ch. 622, inserting the phrase "principal business" in Workmen's Compensation Law, § 8, subd. 4, should also enter into consideration. The following paragraph from the Massachusetts opinion in *McNicol v. Employer's Liability Assurance Corporation* is cited frequently:

"An injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not to have been foreseen or expected, but after the event it must appear to have had its origin in the risk connected with the employment, and to have flowed from that source as a rational consequence."

(1) *Employee engaged in another and a non-hazardous employment at the time of his injury.*—Frank Newman drove a meat delivery wagon, acting both as driver and deliverer, and also delivered meat afoot to places very near his employer's store. While he was carrying a package of meat afoot from the store to a nearby flat, he fell over a pail of broken glass and bled to death from resulting injuries. The court held that the delivery afoot was totally separate from the delivery with the wagon. It said:

"The fact must not be lost sight of that in the case at bar the hazardous occupation as specified by the statute was that of the operation of a wagon drawn by horses, and that in order to be within the statute the injury must have been received while the deceased was employed in that occupation or in one incidental to it."

The opinion in full is as follows:

LYON, J.: The single question presented by this appeal is whether the accidental injury sustained by the deceased, resulting in his death, was one arising out of his employment. Certain facts are undisputed, and were stipulated as

follows: "Agreed statement of facts. Deceased was employed by George Newman, proprietor of a meat market at Oneida, New York; and his principal duties were that of driving a meat delivery wagon, acting both as driver and deliveryman. Occasionally he also assisted in the abattoir; and occasionally, when not engaged in his principal duties, he assisted in cutting and preparing meat for the purpose of retail sale, in accordance with the usual custom of a clerk in a retail meat store; also occasionally delivered meat in places very near the market, going to and from on foot. The wagon and horse were not used for deliveries after 7 P. M.

"On the night of the accident the deceased stopped delivering with the horse and wagon about 7 P. M., and worked in the market cutting and preparing meats in the aforesaid manner until 10 o'clock P. M., and was injured while on his way on foot to arrange with one Dungey for the preparation and care of a dressed hog, purchased by George Newman, to be called for the following Friday. At the time of the accident, deceased had a package of meat for delivery to a nearby flat. The place where he was injured was on the way he would take to go from the market to the flat."

As to the manner in which the deceased received his injuries, the Commission found: "As he was proceeding from the market on his way to the flat where the meat was to be delivered, he fell on a pail of broken glass, severing a varicose vein, causing a hemorrhage which resulted in his death on November 26, 1914." Awards were made to his widow and children of two-thirds of his weekly wages. From such awards this appeal has been taken.

The benefits of the Workmen's Compensation Law are restricted to injuries or death incurred by employees engaged in one or more of the specified hazardous employments. An employee is defined as meaning: "A person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer." (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 3, subd. 4.) Concededly, the hazardous employment in which the deceased was engaged at the time he was injured, if covered by the Workmen's Compensation Law, was included in one or both of the following groups of section 2: "Group 30. Packing houses, abattoirs, manufacture or preparation of meats or meat products or glue." "Group 41. The operation, otherwise than on tracks, on streets, highways, or elsewhere of \* \* \* wagons or other vehicles, \* \* \* propelled by \* \* \* mechanical or other power or drawn by horses or mules."

We do not think the employment of deceased at the time he received the injury can be held to have been within group 30. The accident took place away from the market, and the transaction related to matters specified in that group simply to the extent of arranging for the preparation and care of the dressed hog. Neither do we think the employment can be held to have been within group 41. Concededly, the principal duty of deceased was to drive a meat delivery wagon, acting both as driver and deliveryman. He had put his horse up several hours before, and was engaged in the occupation of a deliveryman on foot. This occupation was not included in any of the groups of hazardous employments, nor was it on this occasion a part of, or in any way connected with, a delivery by horse and wagon, nor can it be said, under the circumstances, to have been a risk incidental to a hazardous employment. The accident did not arise out of a risk related or peculiar to his employment as

such driver. It was a common risk to which any person was equally exposed who chanced to travel that way on foot without regard to the nature of his employment.

It was said in the case of *Matter of McNicol* (215 Mass. 497), in discussing the meaning of the words "arising out" of the employment in the Massachusetts Workmen's Compensation Act (Acts of 1911, chap. 751, part II, § 1): "But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." The fact must not be lost sight of that in the case at bar the hazardous occupation as specified by the statute was that of the operation of a wagon drawn by horses, and that in order to be within the statute the injury must have been received while the deceased was employed in that occupation or in one incidental to it.

In the case of *Sheldon v. Needham* (7 B. W. C. C. 471) the English Court of Appeal held that under the English Workmen's Compensation Act of 1906 (6 Edw. VII, chap. 58, § 1, subd. 1), from which the words of section 10 of our statute "arising out of and in the course of his employment" were taken, a charwoman in regular employment who was sent by her employer to post a letter at a post-box about 100 yards from the house, and who slipped on a banana skin in the street and fell, breaking her leg, was not entitled to the benefit of the act, for the reason that the accident being due to a risk no greater than is run by all members of the public, did not arise out of the employment. In the case cited, various earlier decisions germane to the question at bar are discussed by members of the court and the above doctrine laid down.

It was said by COZENS-HARDY, M. R.: "It has been held repeatedly, not only by this Court but by the House of Lords, that, in a case of this kind, there must be some special risk incident to the particular employment, a risk which imposes a greater danger upon the employee than upon an ordinary member of the public. This can be instanced in many cases," which he then proceeds to discuss. It was said by SWINFEN EADY, L. J.: "I think the law is well established that, if an accident happens to a person who is being employed in the course of her employment, by reason of her being more exposed to risk than other people by reason of that employment, the accident may properly be said to arise out of the employment. Now, COLLINS, M. R., in one of the lighting cases, *Andrew v. Failsforth Industrial Society, Ltd.* (L. R. [1904] 2 K. B. 32; 6 W. C. O. 11), said this: 'If there is, under particular circumstances in a particular vocation, something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of his employment.' In all the cases in which the workman has recovered, there has been evidence that the occupation in which he was engaged exposed him to risks over and above those run by other people. \* \* \* In my opinion

the employment in this case did not expose the charwoman to any particular risk, or to any risk, by going to post a letter, other than that of every member of the public who walks along a street in the ordinary way, and I agree that compensation is not payable."

As before stated, this wording of our statute was taken almost verbatim from the English act, and it is, therefore, reasonable to suppose that the distinguished members of the Wainwright Commission who formulated the act were familiar with the decisions of the English court to the time of adopting the wording of the English act. In fact, the report of the Commission rendered to the Legislature in March, 1910, discusses at some length the English Workmen's Compensation Act of 1897 and its amendments (Senate Doc. 1910, vol. 25, No. 38, pp. 41-43).<sup>\*</sup> The consideration given to the words "arising out of and in the course of the employment" by the English courts prior to the New York act is entitled to much consideration in view of the similarity and purpose of the two acts. *Bellegarde v. Union Bag & Paper Co.*, 90 App. Div. 577, 581; 36 Cyc. 1154-1157.)

Without necessarily going to the extent to which the English courts have gone, we think it must be held that under the conceded facts the injuries sustained by the deceased did not arise out of his employment in a hazardous occupation or incidental to it. The awards made by the Commission must, therefore, be reversed. All concurred. Awards reversed and claims dismissed. *Newman v. Newman*, 169 App. Div. 745, Nov. 10, 1915.

The Court of Appeals affirmed the Appellate Division's order in the Newman case in the following decision:

CHASE, J.: The agreed statement of facts on which the claim herein is based is as follows: "Deceased was employed by George Newman, proprietor of a meat market at Oneida, N. Y., and his principal duties were that of driving a meat delivery wagon, acting both as driver and delivery man. Occasionally he also assisted in the abbatoir; and occasionally, when not engaged in his principal duties, he assisted in cutting and preparing meat for the purpose of retail sale, in accordance with the usual custom of a clerk in a retail meat store; also occasionally delivered meat in places very near the market, going to and from on foot. The wagon and horse was not used for deliveries after 7 P. M.

"On the night of the accident the deceased stopped delivering with the horse and wagon about 7 P. M., and worked in the market cutting and preparing meats in the aforesaid manner until 10 o'clock P. M., and was injured while on his way on foot to arrange with one Dungey for the preparation and care of a dressed hog, purchased by George Newman, to be called for the following Friday. At the time of the accident deceased had a package of meat for delivery to a near-by flat. The place where he was injured was on the way he would take to go from the market to the flat." As the employee was proceeding from the market on his way to the flat where the meat was to be delivered he fell on a pail containing broken glass and severed a varicose vein causing a hemorrhage which resulted in his death the next day.

Compensation under the Workmen's Compensation Law (Cons. Laws, chap. 67) is only payable for injuries sustained or death incurred by employees

<sup>\*</sup> See 60 & 61 Vict. chap. 37; 63 & 64 id. chap. 22; 6 Edw. VII, chap. 58.—[Emr.]

engaged in certain employments defined as hazardous and enumerated in forty-two groups stated in subdivisions of section 2 of said chapter. The only groups or subdivisions which it is claimed are applicable to this case are two numbered 30 and 41.

Said section provides: "Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:" The groups or subdivisions follow, and group 41 provides:

"The operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules."

Assuming that the deceased while engaged in the delivery of meat with a horse and wagon and in any work under his employment incidental thereto would come within group 41 quoted, such provision of the act is inapplicable to the facts enumerated because the employee was not at the time either directly, indirectly, or incidentally engaged in the operation of a wagon propelled by a horse.

The accident occurred after ten P. M. The horse and wagon were not used after seven P. M.

Group 30 provides: "Packing houses, abattoirs, manufacture or preparation of meats or meat products or glue."

The employee was not engaged in a packing house. It does not appear what relation the abattoir bore to the meat market. They were apparently independent, but it may perhaps be assumed that the abattoir referred to in the statement was a place where animals were slaughtered to obtain the meat used in the market. The statement shows that no work was being conducted at the abattoir at the time of the accident, certainly not by the employee whose death occurred as stated.

It is not necessary for us at this time to decide whether the legislature intended to include in the words "manufacture or preparation of meats, or meat products or glue," cutting and preparing meat for the purpose of retail sale. Even if we assume that such work performed in an ordinary meat market is a hazardous employment within the meaning of the act, Newman was not engaged at the time of the accident in such hazardous employment, because he was not at the time cutting and preparing meat for the purpose of retail sale, or doing any act incidental to the cutting and preparation of meat.

Delivering meat is a part of the business of a marketman as a tradesman and not as a manufacturer of "meats, or meat products, or glue."

"An employee" is defined by the act (§ 3, subd. 4) to be "A person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer."

The accident under consideration occurred in the course of the employment, but it did not arise out of any employment defined as hazardous.

The injury must be sustained in connection with or incidental to the hazardous employment.

We are of the opinion that the unfortunate accident to the claimant's husband has no causal relation to a hazardous employment defined by the act, neither was it incidental thereto. The order should be affirmed, with costs

against the appellant. WILLARD BARTLETT, Ch. J., HISCOCK, CUDDERBACK, HOGAN, CARDOZO and POUND, JJ., concur. Order affirmed. *Newman v. Newman*, 218 N. Y. 325, June 6, 1916.\*

Albert Gleisner was janitor of an apartment building. In such general capacity he occasionally repaired its plumbing, covered its pipes with asbestos, did painting and carpentry jobs and operated its steam-heating boiler. He fell and broke his leg while mounting a ladder. According to his own testimony he was on his way to the roof to hang out a flag. This task of hanging the flag may have been incidental to his main occupation of janitor but was not incidental to his plumbing, carpentry or other special hazardous tasks. The occupation of janitor is not among the hazardous employments enumerated in Workmen's Compensation Law, § 2. Therein Gleisner's case differs from Newman's case, presented immediately above. Newman's main occupation of driver was hazardous under Workmen's Compensation Law, § 2. The court noted this difference in reversing the Commission's award to Gleisner. The two cases were decided on the same day, the court drawing the following distinction.

"If an employee is hired for work falling exclusively or predominantly within one or more of the enumerated occupations, his right to compensation for injury in the course of his employment cannot fairly be made to hinge on a finding that he was, at the moment of injury, engaged in an act clearly constituting the direct doing of work named in the act. The painter's right to compensation for injury sustained at his daily trade does not depend on a showing that he was at the moment applying a brush, mixing paints, or mounting a scaffold. If an employee's duties are exclusively or predominantly within an enumerated employment or employments, and he is injured while doing work fairly within the scope of the ordinary and accustomed fulfillment of such duties, he has a rightful claim, even though the particular act he was doing when mishap befell him would not, of and by itself, ordinarily be described by the use of phraseology contained in the statute or as the doing of work enumerated in the statute. To hold otherwise would defeat the fair purpose of the law, and make its operation hinge and its benefits depend on harsh, arbitrary and unworkable distinctions which would inevitably paralyze its practical workings. Where, however, as apparently here, the employee's ordinary duties and accustomed scope of activities do not come exclusively or predominantly within the category of enumerated employments, and only casually and incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named

\* Since this accident to Newman occurred Workmen's Compensation Law, § 2, group 30, has been amended by inserting the words "meat markets."



in the statute. If the employer shows that the employee was not so engaged when he met with injury, he is not entitled to reimbursement under the statute, even though he at times did work embraced within the statute."

The Gleisner opinion in full is as follows:

WOODWARD, J. The award made by the State Workmen's Compensation Commission in favor of Albert Gleisner must be set aside as unsustained by the findings or the evidence.

The claimant met with accident in the course of his daily work for Gross & Herbener, the employer. This firm was in the real estate business, and owned or operated various apartment buildings in the borough of Manhattan, city of New York. One of these was No. 558 West One Hundred and Fifty-eighth street, in which the claimant sustained the incapacitating mishap for which the Commission awarded him indemnity. Admittedly Gleisner's injuries were accidental; undeniably they arose out of and in the course of his employment and were sustained while doing work which was within the course of his duties and the scope of his employment. The sole question here at issue is whether, at the time the claimant met with mishap, he was doing work and "engaged" in an "employment" which the Legislature has designated as "hazardous" and so has brought himself within the purview of the new system of compensation for industrial accidents created by the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1913, chap. 816; Laws of 1914, chap. 41], as amd.).

The Compensation Commission found, as a matter of fact, that the claimant "was employed as a janitor by Gross & Herbener," and that "while in the said employ, he had general charge of the repairs of the building and was engaged to make such repairs as far as he could himself." The finding of fact as to the circumstances of the accident was that "on said date Albert Gleisner was going up on the roof to perform some work on the flag-pole on top of the building; he slipped and fell from the ladder, a distance of seven or eight feet, and fractured his left femur, by reason of which injuries he was incapacitated from the date of the accident for a period of twenty-nine weeks."

These findings of fact do not, however, sustain or warrant the conclusion that the claimant met with accidental injury in the course of an "employment" which the Legislature has defined as "hazardous," as a result of the exhaustive and scientific investigations which preceded the enactment of the Workmen's Compensation Law. On their face, when read in connection with the statutory definitions, these findings altogether overcome any statutory presumption of the applicability of the system to a claim made under it, and leave the Commission's legal conclusion unsustained. The Legislature has not yet found or defined the work of a "janitor," as such, to be a "hazardous" employment; a finding that Gleisner slipped and fell while "going up on the roof to perform some work on the flag-pole," does not sustain the conclusion that this janitor was engaged in one of the employments enumerated in section 2 of the statute. The State Industrial Commission will do well, in the formulation of findings upon which are based its conclusions approving or rejecting a claim, to state, in somewhat greater detail than was done in this instance, the facts which lead it to a determination that an accident

under consideration was sustained in the course of an "employment" whose occupational mishaps the Legislature has made a trade risk and a charge against the cost of the industry's product.

It is, of course, true, as contended in behalf of the claimant, that this court has the unassailable right to examine and to take into account the evidence adduced before the Commission, as supplementing, illumining and explaining, though not as varying or contradicting, the findings of fact made by the Commission. (*Matter of Rheinwald v. Builders' Brick & Supply Co.*, 168 App. Div. 425.) It is likewise true that the record as to the claim at bar contains indications that the injured "janitor" at times did work of a kind enumerated in section 2 as constituting employments within the scope of the compensation plan. He made certain repairs to plumbing and did painting and carpenter work of at least a minor kind; he covered pipes with asbestos; and during the winter months he operated the boiler of the steam-heating plant. This boiler and plant were not, however, in operation during September when Gleisner was injured. The Commission found that Gleisner "had general charge of the repairs of the building and was engaged to make such repairs as far as he could himself," though it must be said that the evidence seemed fairly to indicate that most or all the repair work done by Gleisner was done for tenants rather than for Gross & Herbener. The contention in behalf of claimant is accordingly that the claimant's "employment" was included within group 42 of section 2 of the act, which includes "structural carpentry; painting, \* \* \*; construction, repair and demolition of buildings \* \* \*; plumbing, sanitary or heating engineering; \* \* \* covering of pipes or boilers."

Passing by the question, not argued or passed upon on this appeal, whether the casual and incidental work of a "janitor" along lines which perhaps at times include some "painting," "structural carpentry," "construction, repair and demolition of buildings," "covering of pipes or boilers," and the like, can be deemed to rank that janitor as "engaged" in an "employment" enumerated in group 42 of section 2, we are confronted by the fact that Gleisner's own notices of injury and claims for compensation state that at the time he was injured he was going to the roof upon a ladder for the purpose of hanging up a flag. Although the putting out of a flag on the roof of his employer's building was doubtless an incidental part of his duties as janitor, it cannot in law or common sense be deemed an actual or incidental part of any of the kinds of work enumerated in group 42 of section 2 of the act.

That Gleisner's employer, the tenants, or Gleisner himself, regarded his position and employment as that of "janitor," a non-enumerated employment, is of course not decisive of his right or lack of right to compensation for occupational injury. Regardless of the contractual or colloquial designation of the duties or position of an injured employee, the question remains in every instance as to the work which he was in fact doing and the extent to which his work came within the category of the enumerated employments. The actuality, rather than the appellation, is the sound basis for the Commission's action in determining whether an employee met with mishap in the course of an enumerated employment. If, within the scope of his duties, he was injured while actually and unmistakably doing, at the moment, work of a kind specifically defined in the statute as "hazardous," his right is clear; under other circumstances his right must depend on proof of facts regarding

which the present findings and the present record are alike inadequate basis for affirming an award.

The applicability of the enumerations or definitions of "employments" deemed entitled to the protection of the statute is of course not to be determined narrowly and constrainedly, but rather in the reasonable and common sense manner essential to the vitality of the operation of the statute. If an employee is hired for work falling exclusively or predominantly within one or more of the enumerated occupations, his right to compensation for injury in the course of his employment cannot fairly be made to hinge on a finding that he was, at the moment of injury, engaged in an act clearly constituting the direct doing of work named in the act. The painter's right to compensation for injury sustained at his daily trade does not depend on a showing that he was at the moment applying a brush, mixing paints, or mounting a scaffold. If an employee's duties are exclusively or predominantly within an enumerated employment or employments, and he is injured while doing work fairly within the scope of the ordinary and accustomed fulfillment of such duties, he has a rightful claim, even though the particular act he was doing when mishap befell him would not, of and by itself, ordinarily be described by the use of phraseology contained in the statute or as the doing of work enumerated in the statute. To hold otherwise would defeat the fair purpose of the law, and make its operation hinge and its benefits depend on harsh, arbitrary and unworkable distinctions which would inevitably paralyze its practical workings. Where, however, as apparently here, the employee's ordinary duties and accustomed scope of activities do not come exclusively or predominantly within the category of enumerated employments, and only casually and incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named in the statute. If the employer shows that the employee was not so engaged when he met with injury, he is not entitled to reimbursement under the statute, even though he at times did work embraced within the statute. (*Matter of McQueeney v. Sutphen & Myer*, 167 App. Div. 528; *Matter of Kohler v. Frohmann*, Id. 533; *Matter of Smith v. Price*, 168 id. 421; *Matter of Parsons v. Delaware & Hudson Co.*, 167 id. 536.)

Applying the foregoing to the claim at bar, it is clear that additional evidence must be adduced and more comprehensive findings made before a janitor, who casually and incidentally did plumbing, repair and heating work, may receive compensation under the statute for injuries received while ascending a ladder to the roof for the purpose of hanging a flag.

The award is set aside. All concurred. Award reversed and claim dismissed. *Gleisner v. Gross & Herbener*, 170 App. Div. 37, Nov. 10, 1915.

(2) *Employee drowned while in swimming as diversion from work.*—A deliveryman, returning to put his team in the stable after a short day's work, stopped to take a swim and lost his life by drowning. The State Industrial Commission found, in the following ruling, that "it was no part of his duty to go in swimming:"

LYON, Commissioner.—This is a claim by the mother of John McManus, deceased, for compensation growing out of his death on August 10, 1914.

It seems that John McManus in company with Edward Healy were delivery men for R. H. Macy & Company for a certain territory on Long Island. On Monday, August 10, 1914, the two had been, in the morning, delivering goods sold by Macy to various people and had practically completed their day's work at about twelve or twelve-thirty o'clock. The day was a short day for the two men, because on Mondays they have deliveries for the sales made on the previous Saturday and Saturday being a half holiday, the sales are much smaller than on other days, and the consequence is, that the delivery men have what is practically a half day's rest on Monday. Healy testifies that they had their work all done and were on the way to putting their team in the stable when McManus suggested that being a hot day he would go in for a swim, they being in the vicinity of Jamaica Bay. To this statement Healy made no objection but stayed in the wagon while McManus went into the water. McManus was drowned and the claim is made by the mother under the statute.

In order to succeed the claim has to be brought within the definition of a personal injury as defined in subdivision 7 of section 3 of the Compensation Law, and it must be shown that the accident arose out of and in the course of the employment. I am entirely unable to see how it can be said that the unfortunate drowning of McManus either arose out of or in the course of his employment. Certainly it was no part of his duty to go in swimming. At best he was simply allowed to do so by his co-employee after their day's work was practically done. The claim that the decedent was in the course of his employment when he went in swimming because, the day being hot, he was under necessity of doing so in order to prevent prostration from the heat, seems to me has no basis in fact. In my opinion the claim for compensation must be denied.

The Commission acted upon the foregoing matter in accordance with the foregoing opinion. *McManus v. Macy & Co.*, S. D. R., vol. 6, p. 344, Nov. 24, 1915.

(3) *Employee injured while catching a ride along a public highway on a private vehicle belonging to a person other than his employer.*—An employee traversing a highway in the course of his employment is entitled to compensation for injury due to ordinary, but not to extraordinary, risks. The following ruling of the State Industrial Commission is pertinent in this connection:

BY THE COMMISSION.—The claimant in this case was employed by De Carion & Co., as a painter. On the date of the accident, June 17, 1915, he had been working on a job for his employer, at One Hundred and Sixty-ninth street and St. Nicholas avenue. He stopped work about 5 o'clock P. M. and started for the office of the employer at One Hundred and Sixty-second street and St. Nicholas avenue, where he was required to report before going home. In going to the office he jumped upon a truck which was passing

along the highway. After riding a short distance the truck gave a sudden jolt and claimant was thrown off, receiving injuries consisting of a fracture of the patella. The insurance carrier objects to the claim upon the ground that the injuries did not arise out of and in the course of his employment.

As a general rule, accidents which happen while a workman is going to and returning from work are not considered incidental to the employment. This rule, however, does not apply where the workman is required to be upon the street in the performance of his work. In the claim now before the Commission, the claimant was required to report at the office after leaving the place where he had been working during the day, and his employment was not terminated until he had reached the office. The Compensation Law of this State was apparently intended to cover risks of an employment like the one under discussion, because the term "employee" includes a person "in the course of his employment away from the plant of his employer."

The point to be decided in this case is whether the particular injury received by the claimant was due to an accident which was a natural risk of the employment, or, in other words, whether the accident arose out of the employment. Two cases in which the facts are practically identical have arisen under the Workmen's Compensation Law of England:

In the case of *Morrison v. Clyde Navigation Trustees*, 2 B. W. C. 99, a workman was walking home for dinner through his employer's docks, which were traversed by a railway line. While within his employer's premises the workman endeavored to climb on to a wagon which was traveling on the rails, and in so doing he fell, receiving injuries resulting in serious and permanent disablement. It was held that he did not attempt to climb into the wagon for any object of his employers but for his own convenience or pleasure, and that the accident did not arise out of the employment.

In the case of *Parker v. Pont*, 5 B. W. C. C. —, a farm laborer, at the end of his day's work, was required to go about two miles to his employer's farm to receive his pay and obtain instructions for the next day's work. A fellow workman going the same route with a cart, invited the claimant to ride. He did so and was thrown out and injured, by the horses starting suddenly. It was held by the Court of Appeals that the accident did not arise out of the employment.

It seems clear that the injury received by the claimant was not due to any ordinary risk of the public highway. Had this claimant taken a street car and received an injury in consequence or suffered an injury while crossing the street or passing along the sidewalk, an entirely different question, and one very likely resulting in a different decision, would have been presented. The claim is disallowed. *Peers v. De Carion & Co.*, S. D. R., vol. 5, p. 425, Oct. 27, 1915.

(4) *Employee injured by medicine or other substance not taken at his employer's initiative — poison taken by mistake.*— A carpenter sent to install machinery in a tannery complained of being ill. An employee of the tannery indicated to him the place of storage of some epsom salts. By mistake for the salts, he took some chloride of barium, a deadly poison, and died in

an hour. The Commission made an award to his widow, S. D. R., vol. 6, p. 314. The Appellate Division affirmed the award without opinion, March 8, 1916, but the Court of Appeals reversed the order, stating its reasons as follows:

HISCOCK, J.: An award has been made to the claimant, respondent, and sustained by the Appellate Division, to compensate her for the death of her husband. It was, in substance, found by the commission that the deceased was in the employ of the Carley Heater Company, a corporation engaged in the manufacture and installation of tannery machinery; that at the time of decedent's death this company was installing machinery for another company and the decedent was engaged in the performance of this work; that on the day of the occurrence in question he suffered from some form of illness, and was told by an employee of the company for which the machinery was being installed to take some epsom salts, and was informed where a large quantity of these were stored in the factory; that he went to the place indicated but by mistake took some chloride of barium, which almost immediately caused his death.

Assuming that this occurrence constituted an accident under the act and that it arose in the course of decedent's employment, we are entirely unable to see that it "arose out of his employment." The findings do not indicate that his illness in any manner resulted from his employment or, even if it did, that his employer as an incident to or condition of such employment had undertaken to supply medical attendance or medicines in ministering to such an illness as this was, it not being of an emergent character. The employer had done nothing to authorize or induce the decedent to take the poison on the supposition that it was something which he needed or which would be beneficial to him. Decedent's illness and his attempt to minister thereto were not ordinary and natural incidents to his employment. On the contrary, it is found that decedent's mistake was the result of his voluntary action induced by the advice of one who was not even in the employment of his employer but legally was an utter stranger thereto. It was an employee of the company for which decedent's employer was working who persuaded or advised him to take the medicine and who guided him to the place where instead of taking such medicine he obtained the poison which caused his death. It seems to us that the case is not different than it would have been if the decedent voluntarily acting upon the advice of a stranger had visited a physician who injured him by malpractice or had sought a dispenser of prescriptions who gave him poison instead of helpful medicine and certainly it could not be said that such an occurrence would have arisen out of his employment within the meaning of the statute.

The case is clearly distinguishable from those cited by the learned counsel for the respondent where an employee seeking to do something which was inevitably connected with his employment and an incident thereto, as obtaining a drink of water, had been injured by foul water which he might have been expected to drink or by some poisonous liquid placed at a point where it might reasonably be mistaken for drinking water.

We think that the order should be reversed and the claim dismissed, with costs against the commission.

WILLARD BARTLETT, Ch. J., CHASE, CUDDEBACK, HOGAN, CARDOZO and POUND, J.J., concur. Order reversed, etc. *O'Neil v. Carley Heater Co.*, 218 N. Y. 414, June 16, 1916.\*

(5) *The employee is injured by horseplay.*—Millie De Filipis, a fifteen-year-old factory girl, lost the use of an eye by the sportive scissors thrust of a girl co-employee. The court held that the accident arose “in the course of” but did not “arise out of” her employment. It said:

“The injury resulted solely from the sportive act of a co-worker who was in no way representing the master and which act in no way grew out of or was connected with the employment.”

The decision appears to involve elements, elimination of which the court has elsewhere declared to have been a main object in the enactment of the law of compensation. It seems to recognize *fault* where the injured employee is an active participant in the horse-play. It denies responsibility of the employer for the character and conduct of the employee's co-employees. The British cases cited suggest the fellow-servant doctrine. Injury by horse-play differs from injury by assault. It seems that compensation should be denied to a foreman injured while at work by a piece of iron maliciously thrown by one of his subordinates at another but should be granted to him if he is injured by the same piece of iron thrown at him by the same subordinate in anger at his reproofs in the capacity of a superior. The court concludes that “if the act be deemed unjust or unsatisfactory the remedy is with the Legislature.” The Court of Appeals has affirmed the Appellate Division's decision without opinion, October 24, 1916. The opinion of the Appellate Division in full is as follows:

LYON, J.: The question presented by this appeal are whether the injuries sustained by the claimant were accidental injuries, and if so, whether they were injuries “arising out of” her employment, within the intent of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 10).

The claimant, a girl fifteen years of age, was employed as an operator of a button-hole machine in the manufacture of shirts and pajamas. Connected with the factory were two adjoining toilet rooms having a partition between them. The Commission has found, upon somewhat contradictory evidence, that “At about two o'clock in the afternoon, Millie De Filippis went

\* Compare the case of ivy poisoning, p. —, following.

to the toilet, and she was struck on the arm by something, and looked through a crack to see where the article had come from, when a girl in the adjoining toilet thrust some scissors in the crack into her eye, causing a loss of 75 per cent of the vision of right eye, and the consequent loss of the use of the eye \* \* \*. The injuries to Millie De Filippis were accidental injuries, and arose out of and in the course of her employment \* \* \*."

I think the occurrence was properly held to have been accidental. (*Trim Joint District School v. Kelly*, 7 B. W. C. C. 274; 30 T. L. Rep. 452.) The event was unlooked for, and not designed or expected by either girl, and within the popular and ordinary use of the word was an accident. I think, also, that the injury arose in the course of her employment. But can the injury be said to have arisen "out of" the employment of the claimant? Undoubtedly, while accepting the conveniences of the toilet, the claimant was still in the employ of the master. (*Houston & Texas C. R. Co. v. Turner*, 99 Tex. 547; *Elliott v. Rex*, 6 W. C. C. 27; *Zabriskie v. Erie R. Co.*, 85 N. J. L. 157.) Her being there was reasonably incidental to and within the scope of her employment. It was in the interest of her employer as well as of herself that she should be able to continue her work without physical inconvenience.

Had an accidental injury resulted from the condition of the room, or of the toilet appliances, the injury might properly have been held to have arisen out of the employment. In fact, had there been a nail or a scissors blade imbedded in the wood and projecting from the side of the partition, which accidentally injured her eye as she turned to see what touched her, I think the injury would have been incidental to the use of the room for toilet purposes, and claimant entitled to an award. However, the injury resulted solely from the sportive act of a coworker who was in no way representing the master, and which act in no way grew out of or was connected with the employment. A test spoken of in the case of *Plumb v. Cobden Flour Mills Co., Ltd.* (7 B. W. C. C. 1), as a sound and convenient test in determining whether the injury arose out of the employment is whether it is in the scope or sphere of the employment. The injury in the case at bar was not a peril of the service, nor was it reasonably incidental to the employment. It was not an assault which had its origin in the nature of the employment, nor was in any way whatever connected with the master's work. In *Matter of McNicol* (215 Mass. 497) the court said: "It [an injury] 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment." In the case at bar there was no causal connection between the work and the injury resulting from the independent affirmative act of a coworker. The following are some of the cases bearing upon the subject:

Where an employee lost the sight of one eye when a fellow-employee came from another room, pointed a toy camera at him, and before he could protect himself, discharged the spring projectile, which struck him in the eye; held, that the accident did not arise out of the employment and that the



claim for compensation should be denied. (*Fishing v. Daly Bros. & Royal Indemnity Co.*, California Industrial Commission, June 16, 1915.)

A maliciously threw a piece of iron at B, but struck the eye of C, who was at work; held, that the accident to C did not arise out of and in the course of his employment. (*Armitage v. Lancashire & Yorkshire Ry. Co.*, 4 W. C. C. 5.)

Some workmen as a practical joke put a hook of their employer's crane which they were working, through the neck cloth of a fellow-workman, who was at the time engaged in his work on his employer's wharf, and commenced to draw him up through the warehouse. The man held the chains with his hands as long as he could, but eventually had to let go his hold and fell a considerable distance and was seriously injured; held, that the injury did not arise out of the employment. (*Fitgerald v. Clarke & Son*, 1 B. W. C. C. 197; L. R. [1908] 2 K. B. 796; 99 L. T. Rep. 101.)

Several boys were employed picking stones and bats out of coal running past on a belt. It was their duty to throw these into a cart nearby. One boy maliciously threw a stone at another and so injured him that his eye had to be removed. There was a notice posted up prohibiting the throwing of stones, but no direct evidence that the boys were in the habit of throwing stones at each other; held, the accident did not arise out of the employment. (*Clayton v. Hardwick Colliery Co., Ltd.*, 7 B. W. C. C. 643.)

A domestic servant while engaged in the performance of her duties was struck in the eye by a child's ball playfully thrown at her by a fellow-servant—the child's nurse—with the result that she almost completely lost the sight of the eye; held, that the accident was not one arising out of the employment within the meaning of the English Workmen's Compensation Act of 1906 (6 Edw. 7, chap. 58, § 1, subd. 1). (*Wilson v. Laing*, 2 B. W. C. C. 118; 46 S. L. R. 843.)

Claimant having just washed her hands upon the completion of certain work, was struck and injured by a ball of burlap thrown in a spirit of play by one of her coemployees at another; held, that the injury did not arise out of and in the course of the employment (*Howley v. American Mut. Lia. Ins. Co.*, Mass. Ind. Acc. Bd. Case No. 1032; Nat. Comp. Journ. [Nov. 1914], vol 1, No 11, p. 20.)

A workman for no apparent reason deliberately assaulted a fellow-workman, who, in trying to prevent himself falling over a moving rope, swung up his hand which was holding a hammer, and injured the other workmen's eye; held, that the accident did not arise out of and in the course of the employment. (*Shaw v. Wigan Coal & Iron Co., Ltd.*, 3 B. W. C. C. 81.)

In the following cases also it was held that the injury did not arise out of the employment:

A boy sent to clean a machine at rest was larking with another boy, and accidentally started the machine thereby injuring himself. (*Cole v. Evans*, 4 B. W. C. C. 138.)

A turner while larking with another turner was knocked into a lathe and injured. (*Wrigley v. Nasmyth, Wilson & Co.*, W. C. & Insur. Rep. [1913], 145.)

Claimant while employed at his bench was struck on the knee by a block thrown by some person to him unknown, whether in jest or malice he could not say. (*Matter of Boelema*, Mich. Ind. Acc. Board., 4 N. C. C. A. 855.)

However, it was held in *Hulley v. Moosbrugger* (Supreme Court of New Jersey, Feb. 1915, 87 N. J. L. 103; 8 N. C. C. A. 283; 93 Atl. Rep. 79) that where a plumber, while passing to a bin to get fittings for a job, dodged the attack of the arm of a fellow-workman, thrown out in a spirit of fun either to knock off his hat or to strike him and in doing so slipped and fell on the descending concrete floor, whereby he received injuries from which he died, the accident arose out of his employment within the New Jersey Workmen's Compensation Act. (See New Jersey Laws of 1911, chap. 95, as amd.) It is to be observed, however, that in that case the cause of the accident was two-fold, and that it was very much owing to the descending concrete floor, and that to such extent a causal connection existed between the conditions under which the work was required to be performed and the resulting injury. It is also to be observed that the New Jersey Workmen's Compensation Act does not limit the liability of the employer to certain specified hazardous employments as the New York act does, but that the New Jersey act covers all employments, exclusive of casual employments.\*

As suggested in the opinion in *Matter of Newman v. Newman* (169 App. Div. 746), decided at this term, the words "arising out of and in the course of his employment," in section 10 of our statute, were taken from the English Workmen's Compensation Act of 1906 (6 Edw. 7, chap. 58, § 1, subd. 1), with which the members of the Wainwright Commission were familiar, as they doubtless were also with the decisions under that act; hence due consideration should be given to such decisions in passing upon the construction to be given to the language in question. (*Bellegarde v. Union Bag & Paper Co.*, 90 App. Div. 577, 581; 36 Cyc. 1154-1157.)

While the injuries suffered by the claimant must necessarily excite the sympathies of the court, the interpretation of the statute above given seems to be the necessary one, even giving the language as broad a construction as can fairly be given it. If the act be deemed unjust or unsatisfactory the remedy is with the Legislature.

The award made by the Commission must be reversed. All concurred, except KELLOGG and WOODWARD, JJ., dissenting. Award reversed and claim dismissed. *De Filippis v. Falkenberg*, 170 App. Div. 153, Nov. 10, 1915.

In connection with the DeFilippis case, the three following cases, in which the Commission likewise awarded compensation, are suggestive: *Kelleher v. Swift & Co.*, S. D. R., vol. 4, p. 356, in which a meat handler's eye had been destroyed by a tag fastener tossed by a fellow workman; *Boesenberg v. Butterick Publishing Co.*, S. D. R., vol. 4, p. 367, in which a pressman had slapped a sleeping fellow workman to awaken him and incidentally to the act lost his eye in a collision with a press rack; and *Markell v. Green Felt Shoe Co.*, S. D. R., vol. 8, p. 487; — App. Div. —, Nov. 15, 1916, in which a shoe factory employee lost his

\* *Hulley v. Moosbrugger* was reversed November 15, 1915 (95 Atl. Rep. 1007.—[BAP.]

eye from a pencil point protruding from the pocket of a fellow workman who embraced him in order to attract his attention.

(6) *The employee's injury is due to assault not connected with his work.*—A ruling of the New York State Workmen's Compensation Commission illustrative of this point is that of *Myers v. Smith*, decided March 29, 1915, and filed as Claim No. 6222. Myers, an employee in an Albany brickyard, was stabbed by an Italian co-employee, July 13, 1914. The direct cause of the affair appears to have been a dispute about drinking water and the general cause, race feeling. The testimony was conflicting on the score of Myers' participation in the resulting fight. The deputy in charge recommended an award of compensation but the Commission after investigation disallowed the claim "on the ground that the injuries received by the claimant did not arise out of the employment."

Another illustration is the case of *Cowen v. Cowen's New Shirt Laundry*, unanimously affirmed by the Appellate Division under date of December 29, 1916. The manager of the laundry was shot by an employee whom he had discharged. The grounds upon which the Commission denied an award to his dependents are stated by Commissioner Lyon as follows:

Lyon, Commissioner.—I am unable to see how Mr. Cowen's death can be held to have resulted from an accident arising out of and in the course of his employment. It is true there is evidence in the case that Ward, prior to and on the day of his discharge, frequently made remarks which might be construed as threats against Mr. Cowen. He is said to have stated that Jack, meaning Mr. Cowen, "nagged" him; that such men as he, Cowen, had brought on the war in Europe and ought to be shot; that he would "get him;" that he would "beat him up," and expressions of this character. There is also some evidence that Mr. Cowen had been told of these threatening remarks and that when Ward came to be discharged, he delegated that duty to his brother rather than make the discharge himself.

The act of killing Mr. Cowen appears to be either that of a mad man or of a man who was "crazy drunk," as some of the witnesses said Ward sometimes became. It has been held that where an employee feeling aggrieved during the period of his employment with another employee, for something growing out of the employment, assaults his co-employee, that such an assault is an accidental injury within the meaning of the Compensation Law; but I am unable to see how the act of a man who was apparently in the mental condition that Ward was in, who does not commit his act of violence during his employment but eight months after his discharge, can be held to be so connected with the employment as to make the recipient of his act subject to compensation. There is no evidence in the case that Ward had any reason for his alleged feeling against Mr. Cowen. An assault to

come within the Compensation Act, in my opinion, must be either pending the employment of the one who commit it, or so shortly after the cessation of the employment as to be necessarily connected with it, or at least must be for some real grievance shown to have arisen out of the employment or both.

The present application, I think, comes within neither of these cases and I advise that an award be denied. *Cowen v. Cowen's New Shirt Laundry, Inc.*, S. D. R., vol. 8, p. 481, May 3, 1916.

Cases of assault in which awards were made on the ground that the assaults arose out of the employment are presented below, pp. 205-217:

(7) *The employee's injury is due to disease not attributable to his work.*—Disease resulting from an accident is compensatable (Workmen's Compensation Law, § 3, subd. 7), but accidental injury resulting from disease is not compensatable. A "fainting spell" due to a weak heart caused an employee to fall upon a hard pavement and fracture his skull. The Appellate Division so found in direct contradiction of a finding of the State Industrial Commission. The court's statement of the facts and decision reversing the Commission's award is as follows:

WOODWARD, J. The award made and the proceedings had in the State Industrial Commission with reference to this claim were alike predicated upon serious misunderstanding of the fundamental requisites of that fair arbitrament of "the substantial rights of the parties," which is directed by section 68 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). The proceedings before the Commission disclose a basic misapprehension as to the meaning and requirements of sections 21, 67 and 68 of the law, and the outcome is an award upon a claim which should have been dismissed.

The deceased was an assistant foreman in the employ of the street department of the Brooklyn Union Gas Company. His duties were negligible, so far as active physical work or exertion was concerned. While he was sweeping dirt and pebbles off the paving in the vicinity of the work being done by the gang of men to which he was attached, he suddenly fell to the street. Seventeen days later he died in the hospital, and an autopsy revealed that in his fall he had evidently received a fracture of the skull. The same autopsy disclosed that the fall had in all probability been due to an attack of cardiac syncope, to which the previous condition of the heart predisposed it. At the time the deceased was recovering his wits, after his fall to the pavement, he told a fellow workman that "a weak spell must have come to him," and on the following day he told an examining physician that "he had a dizzy spell."

The claimant's original theory had evidently been that this cardiac syncope and fainting was due to the presence of an excessive quantity of gas emanating from the trench near which the decedent was when he fell. The proof

wholly failed to give any support to that theory, and the Commission based its award instead upon a finding that Collins "stumbled over some obstruction in the street and fell to the ground." All the evidence adduced before the Commission negatived the idea that there was any "obstruction in the street," anything over which Collins did stumble or might have stumbled. There was no evidence adduced to indicate that Collins did stumble, or that he fell as a consequence of doing or while doing any particular act or while putting forth any particular exertion. There was not a vestige of evidence in the case to indicate that Collins' fall was due to anything except that, while standing in the street, he happened to have a sudden attack of cardiac syncope, to which he was predisposed. There was nothing to sustain the finding that his injury was "accidental" or that it arose "out of" the employment, except in the sense and to the extent that his sudden spell of fainting came during working hours and had more serious consequences because at the time he was standing on a hard pavement.

The claimant in fact presented no "proof" or "evidence" at all, and rested her case solely upon the "employee's claim for compensation," a paper so "fearfully and wonderfully" drawn that it did not correctly state the deceased's employment or the street in which he fell, and left doubt for the most part whether the claimant's husband was alive or dead at the time the paper was filled out. Even the allegations of this paper showed no "stumbling," no "obstruction," no "accident," nothing arising "out of" the employment; the employer's proofs disproved the "gas" and the "obstruction" theories, and indicated that there was no "stumbling."

Nevertheless, at the close of the hearing, the deputy who sat in behalf of the Commission said: "I am going to deny your request and allow the claim on the basis that the accident arose out of and in the course of the employment, in the absence of proof to the contrary, and on the further ground that the testimony of the witnesses would indicate that there was an accident."

This, and the Commission's subsequent finding of fact as to an "accident" through "stumbling over some obstruction," were, of course, as we have already pointed out, lacking in evidence tending to support the same, and, hence, fully reviewable here. It should, moreover, be said that the deputy commissioner incorrectly stated and applied the presumptions arising under section 21 of the act. There is nothing in section 21, or any other part of the act, which relieves a claimant from producing evidence that the injuries arose "out of and in the course of" an employment of the injured person by the employer against whom the claim is directed. Once that evidence of the employment, the injury in the course of it, the injury as result of something arising from the employment, is submitted, the first presumption enumerated in section 21 carries presumption of the Commission's jurisdiction, the applicability of the statute, the "hazardous" character of the employment proved, and the inclusion of the work being done by the injured person at the time of the injury within the scope of an "employment," enumerated and defined as "hazardous" (*Matter of McQueeney v. Sutphen & Myer*, 167 App. Div. 528; *Matter of Kohler v. Frohmann*, Id. 534), and the second, third and fourth items of section 21 carry presumptions covering, in the absence of substantial evidence to the contrary, the other conditions precedent specified in section 10. The Commission is not

authorized, however, to make an award under the act in the absence of at least some evidence that the employee met with an injury while he was at work for the specified employer, and as a consequence of something that had a relation to the work of the employer, something done by him or by others while he was so employed. The act does not undertake to make the employer an insurer of the life, health or regular heart action of an employee during the hours of labor, in the absence of proof that injury was due, for example, to a fall caused by cardiac syncope arising from over-exertion in the course of the employment.

The errors of this Commission were such as to fall clearly within the powers and duty of this court to curb and correct. The time has not yet come when money may be taken directly from an employer and indirectly from the patrons of a great public utility upon such a paucity of proofs and such a pretense of judicial findings as are revealed by this record.

The claim is remanded to the Commission; unless further and satisfactory proof is adduced, it should be dismissed.

All concurred, LYON, J., in result, except KELLOGG, P. J., dissenting; SMITH, P. J., not being a member of the court at the time of the decision; COCHRANE, J., not sitting.

Award reversed, and matter remitted to the Commission for its action. *Collins v. Brooklyn Union Gas Co.*, 171 App. Div. 381, January 18, 1916.

*b. Injuries in employment not included under Workmen's Compensation Law, § 2.*—By inclusion or exclusion the two successive commissions and the courts have been defining and fixing the limits of the forty-three separate groups enumerated in Workmen's Compensation Law, § 2. The effect of these court decisions as precedents has been affected adversely or favorably by the half a hundred amendments to Workmen's Compensation Law, § 2, made by L. 1916, ch. 622. The opinions whose texts follow establish the general rule of judicial construction for § 2.

In *De La Gardelle v. Hampton Co.*, the Appellate Division affirmed a determination of the Workmen's Compensation Commission that the preparation of meats and food stuffs named in Workmen's Compensation Law, § 2, groups 30 and 33, does not embrace ordinary cooking operations. Justice Woodward (concurring) said: "It is no function of the courts to extend by judicial determination the category of occupations entitled to the protection of the statute." The full text is as follows:

LYON, J.: The deceased was employed as a butcher, or assistant to the chef, at the Hampton Hotel in Albany. His duty was the distribution of meats to the cooks as ordered. While boning a leg of mutton on the butcher block, his knife accidentally slipped and severed an artery in his groin, resulting in femoral hemorrhage, causing his death.

Concededly, his death arose out of and in the course of his employment, and was not occasioned by any of the excepted causes stated in the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1913, chap. 816, as re-enacted and amended by Laws of 1914, chap. 41, and amd. by Laws of 1914, chap. 316).

The Hampton Company had secured compensation to its employees by insuring with the Fidelity and Deposit Company of Maryland. His widow, as dependent upon her husband for support at the time of his death, presented a claim for compensation. After a hearing duly had, the Compensation Commission, holding that the deceased was not engaged in a hazardous employment within the meaning of the State Workmen's Compensation Law, unanimously denied the claim of the widow for compensation. From such decision this appeal has been taken.

The appellant contends that the deceased was engaged in a hazardous employment embraced within groups 30 and 33 of section 2 of the Workmen's Compensation Law, which read as follows: "Group 30. Packing houses, abattoirs, manufacture or preparation of meats or meat products or glue." "Group 33. Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries."

It was the opinion of the Commission that the preparation of meats and the preparation of food stuffs, as the word "preparation" was used in section 2 of the Workmen's Compensation Law, did not mean the ordinary preparation of meat or food stuffs for cooking purposes, but involved a preparation by some mechanical device, or a preparation which either changed the form of the material to render it suitable for use, or changed the nature of the material for the same purpose. Under this construction of the law, the Commission denied the claim of appellant for compensation.

We think the claimant was not entitled to compensation, and that the determination of the Workmen's Compensation Commission should be affirmed, but without costs.

All concurred; **WOODWARD, J.**, in opinion.

**WOODWARD, J.** (concurring): I concur and vote to affirm the unanimous determination of the State Workmen's Compensation Commission that the claimant's husband was not, at the time of the mishap which inflicted upon him mortal injury, engaged in an employment which the Legislature has designated as "hazardous." As the result of extensive investigations, conducted under legislative authority by the so-called Wainwright Commission, the State Factory Investigating Commission and the State Department of Labor, the Legislature enacted in 1914 the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 67], as amd. by Laws of 1914, chap. 316), embodying a new plan, theory and basis of indemnity to workmen for loss of earnings occasioned by accidents occurring in the course of employment found to be inherently hazardous. (*Matter of Rheinwald v. Builders' Brick & Supply Co.*, 168 App. Div. 425, decided May 14, 1915.)

Within the employments determined by the Legislature to be "hazardous," and consequently designated by it as embraced within the purview of the statute, the latter should be beneficially construed to effectuate the legislative purpose, but it is no function of this court to extend by judicial determination the category of occupations entitled to the protection of the statute. Determination as to what employments shall be brought within the operation of the Workmen's Compensation Law involves questions of fact and

questions of policy which the Legislature and Governor must determine. This court is without power or information entitling or enabling it to alter or extend the legislative determination.

Groups 30 and 33 of section 2 of the statute under consideration, which enumerates and defines hazardous employments, cannot, in my judgment, be regarded as covering any employment consisting of the preparation of meat or food stuffs for cooking purposes, in the ordinary course of household duties, domestic service or the conduct of hotels or restaurants in which meats or foods are prepared and cooked for eating on the premises. These groups, as phrased by the Legislature, relate obviously to employment in industrial establishments or manufactories where meats, fruits, vegetables and similar food stuffs are prepared for sale for consumption elsewhere. The Legislature cannot fairly be deemed to have brought within the purview of group 30 or 33 those workers who sustain injury in the ordinary course of the preparation of food for cooking in the kitchens of private residences or public restaurants. If it is deemed socially desirable that the statute be extended to any of those avocations the recommendation should be addressed to the Legislature and not to the court.

Determination of Workmen's Compensation Commission confirmed. *De La Gardelle v. Hampton Co.*, 167 App. Div. 617, May 5, 1916.

Later, in November, 1915, the Appellate Division, Justice Howard dissenting, decided without opinion that the words "manufacture of small castings or forgings, metal wares, etc.," in § 2, group 23, could not be construed to include horseshoeing: *Grady v. Holliday*, 171 App. Div. 959. The Legislature has amended group 24 to cover horseshoers.

In *Tomassi v. Christensen*, the Workmen's Compensation Commission awarded compensation to a ragpicker upon the ground that he was engaged in longshore work. The Appellate Division reversed the award in January, 1916. The court said: "The presumption raised by section 21 of the act that the case comes within the act does not permit the words of the statute to be warped from their usual and ordinary meaning." The full text of the opinion is as follows:

KELLOGG, P. J.: The Commission has found, in substance, that a ragpicker, searching for rags among the rubbish delivered by wagons at a city dump at the foot of a street, is engaged in longshore work. While picking rags upon a dump at the foot of West Eightieth street, New York, the claimant cut his thumb upon a piece of glass. Later infection set in, and the disability for which the award was made resulted.

Group 10 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) is as follows: "Longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal,



ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage."

The subdivision of the section quoted carries with it the legislative understanding as to what "longshore work" means. Such employment not only refers to the loading and unloading of cargoes, but to the moving or handling of any part of a cargo upon any dock, platform or place, or in any warehouse or other place of storage. The word "cargo" ordinarily means the lading or freight of a ship or other vessel; the goods, merchandise or whatever is conveyed in a vessel or boat. The claim, therefore, is not within this group unless claimant was loading or unloading, moving or handling a part of a cargo. The fact that the city dump was at the foot of a street and that the plaintiff was working upon it does not make his work longshore work any more than if the dump had been at a distance from the shore. The Commission had the right to assume that scows would come alongside of the dump from time to time and remove the refuse, but the claimant had nothing to do with the removal. The refuse forming the dump was brought to the place by wagons, and from time to time the claimant and others would go over the dump in search of rags or any other things of value. This was not to prepare the refuse upon the dump for shipment, but was in the interest of the contractor who had the right to go over the dump and take from it anything he wished. The refuse would be removed whether the contractor exercised his right or not; but to get the value of his contract he would be interested in having his employees take from it before removal whatever was of value. There is nothing to indicate that the plaintiff ever went upon the scows, but if he searched for rags upon the scows he was not there for the purpose of loading or unloading or handling the cargo, but solely for the purpose of taking from the scow whatever he might find there of value, not in the interest of the shipping of the cargo, but in the interest of the contractor in obtaining what profit he could from the refuse. But there is nothing to indicate that the claimant worked upon the scows. The evidence shows that his work was upon the dump as wagons were throwing the refuse upon it.

The presumption raised by section 21 of the act that the case comes within the act does not permit the words of the statute to be warped from their usual and ordinary meaning. It relates more to the facts; so far as it affects the construction of the statute itself it can only be material as indicating that the statute is a remedial one and should be given a liberal construction in order to carry out the beneficial purposes intended to be accomplished by the law. It is the duty of the Legislature and not of the Commission or of this court to determine what employments are hazardous. With reference to the act an employment is either hazardous or non-hazardous, and no employment can be treated as hazardous unless the act, fairly construed, declares it such. We cannot give to the language employed a strained or unusual meaning for the purpose of bringing within the act an employment not intended by the Legislature to be embraced within it. The handling and moving of cargoes is hazardous on account of the conditions under which they are moved and handled in loading and unloading boats and the nature and quality of the merchandise usually making such cargoes. The hazard arises from the heavy nature of the work. Picking

raggs from a dump at the foot of a street was not fairly within the legislative meaning when it declared longshore work to be a hazardous employment. The Commission, therefore, made an error in law when it declared that the claimant was engaged in longshore work at the time of the accident, and for such error its award must be reversed within the *Gardner* case (*Matter of Gardner v. Horseheads Construction Co.*, 171 App. Div. 66), decided at this term of court.

Upon the argument the Attorney-General suggested that the case might fall within group 28 of section 2 of the act, which is "manufacture of drugs and chemicals \* \* \* medicines, \* \* \* fertilizers, including garbage disposal plants; shoe blacking or polish." The Commission has found no fact tending to show that the claimant was employed in the manufacture of fertilizers or upon a garbage disposal plant connected in any way with such manufacture. It would seem to be a straining of this subdivision of the statute to bring the work of the claimant within its provisions. Undoubtedly some of the garbage collected through the city and thrown upon a dump might be used for fertilizers; but the group contemplates a manufacture of fertilizers and a garbage disposal plant in some way connected with such manufacture. A mere dumping of refuse which may contain material valuable as a fertilizer does not make the dump a garbage disposal plant. In the absence of some evidence or some finding to indicate more particularly the character of the dump, it cannot be assumed that the claimant was engaged in that employment. A new hearing may develop further facts, but upon the theory upon which the case was heard and disposed of by the Commission, we find that the award is not justified and that the Commission committed error of law in making it. It, therefore, should be reversed, and the matter remitted to the Commission for its action.

All concurred; SMITH, P. J., not being a member of the court at the time of the decision; COCHRANE, J., not sitting.

Award reversed, and matter remitted to the Commission for its action. *Tomassi v. Christensen*, 171 App. Div. 284, January 5, 1916.

The Appellate Division, however, in an opinion written by Justice Kellogg previously to his opinion in the *Tomassi* case, had held that an elevator was a vehicle under § 2, group 41. The court had said:

KELLOGG, J.: Unquestionably the deceased met his death while in the employment. A freight elevator was used sometimes by the employees in going from floor to floor, especially when carrying merchandise or freight, and the deceased frequently used it. The Commission has found that he accidentally fell down the shaft and was killed. He was found at the bottom of the shaft. It also finds that he was employed as a porter and shipping clerk, and that one of his incidental duties was to operate the elevator when he had occasion to use it. It also finds that the employers were engaged in the business of selling glassware.

The employers' first report describes their business as a glass selling agency. The employers' affidavit, attached to the proof of loss, in answer to the question "What is the kind and character of the business conducted?" answers

"Mfr's glassware." But the finding of the Commission that the employers were engaged in the business of selling glassware, in connection with the evidence, establishes conclusively that they were not manufacturers of glass but sellers of glass only, and, therefore, the case does not come within group 20 of section 2 of the Workmen's Compensation Law. The employee was not engaged in a hazardous business within the Workmen's Compensation Law unless the business falls within group 41 of that section, which embraces "The operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules." There was no elevatorman, but the elevator was used in the business by the different employees from time to time. The serious question is whether it was a "vehicle" within the meaning of group 41. Clearly it was a means of carrying persons and things, and falls fairly within the definition of a vehicle. There seems to be no good reason why cars, trucks and wagons, propelled in the manner mentioned in that group, should be included and an elevator excluded. They are all vehicles for the carrying of persons and things. It cannot be urged that an elevator is excepted by the expression "otherwise than on tracks." There are guides upon each side of the elevator to keep it plumb and to facilitate its operation, but it cannot be said to be operated upon tracks within the meaning of that group of said section. If such a construction were to be given, the reasoning would force it into group 1 which includes the operation of railways operated by steam, electric or other motive power, street railways and incline railways. The elevator is operated by the power mentioned in group 41, and a liberal construction of the statute brings it within that group. Groups 1 and 41 seem to embrace the operation of every kind of a vehicle by steam, electric or other motive power. The award should, therefore, be affirmed. Award unanimously affirmed. *Wilson v. Dorflinger & Sons*, 170 App. Div. 119, November 10, 1915.

The Court of Appeals reversed this order of the Appellate Division in April, 1916. Judge Bartlett writing the opinion, said:

The courts are not concerned with the wisdom of the legislation under consideration when they are engaged in construing a statute. Their only purpose is to ascertain the true meaning and intent of the law makers. \* \* \* The character of the Workmen's Compensation Law indicates that it was prepared with the utmost care and it is only fair to its authors to assume that nothing was inadvertently omitted therefrom.

The full text of the opinion is as follows:

WILLARD BARTLETT, Ch. J. This claim grows out of the accidental death of William H. Wilson, the husband of the claimant, who was employed as a porter and shipping clerk by C. Dorflinger & Sons, who were engaged in the business of selling glassware in the city of New York. One of the incidental duties of Wilson was to operate an elevator on the premises of his employers when he had occasion to use the same. On September 30, 1914, being engaged in thus operating the elevator, he accidentally fell down the

elevator shaft, and was so severely injured that he died on the same day as the result of the fall. The workmen's compensation commission has decided that his injuries arose out of and in the course of his employment, and the only question presented by this appeal is whether the case falls within the purview of the Workmen's Compensation Law (Chap. 816 of the Laws of 1913, as re-enacted and amended by chap. 41 of the Laws of 1914).

The Workmen's Compensation Law enumerates forty-two groups of hazardous employments, and provides that compensation thereunder shall be payable for injuries sustained or death incurred by employees engaged in any of these employments. If the employment in which the claimant's husband was engaged when he was accidentally killed by falling down the elevator shaft was one of those thus enumerated in the statute there would be no question as to the right of his widow to recover compensation for his death. The finding of the commission, however, is that he was employed by a firm "engaged in the business of selling glassware," and this employment is not mentioned in any of the groups enumerated in the Workmen's Compensation Law. The manufacture of glass, glass products, glassware, porcelain or pottery is covered by group 20; but that group does not extend far enough to include the business of selling glassware. The Appellate Division concedes this and holds that the employee was not engaged in a hazardous business within the Workmen's Compensation Law unless the business falls within group 41 of the act, which embraces the operation "otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horse or mules."

It is only by construing the word "vehicle" in this group as broad enough to include an elevator that the present case may be brought within the scope and operation of the Workmen's Compensation Law. The Appellate Division pronounced the question a serious one, but reached the conclusion that an elevator fell fairly within the definition of a vehicle. "There seems to be no good reason," says the opinion, "why cars, trucks and wagons propelled in the manner mentioned in that group should be included and an elevator excluded." It may be observed, however, that the courts are not concerned with the wisdom of the legislation under consideration when they are engaged in construing a statute. Their only purpose is to ascertain the true meaning and intent of the law makers. If the legislature has not included the operation of elevators generally within the Workmen's Compensation Law, but has confined compensation for accidental injuries in elevators to such accidents as occur in certain specified employments, the argument that it would have been wise to establish a broader liability is not available here.

The character of the Workmen's Compensation Law indicates that it was prepared with the utmost care and it is only fair to its authors to assume that nothing was inadvertently omitted therefrom. The mention of the "operation of grain elevators" in group 29 indicates that the operation of elevators generally must have been considered; yet we find no mention of elevators anywhere else in the statute unless, as held by the Appellate Division, it is included in the term "vehicles" as used in group 41. We agree with that learned court that the Workmen's Compensation Act must be liberally construed, but we think that the rule of *ejusdem generis* applies

to group 41 and that the vehicles therein referred to are structures similar to those previously mentioned, that is to say, similar to cars, trucks or wagons operated on streets and highways. An elevator which runs up and down bears no similarity either in construction or method of operation to such vehicles. We think that a construction which brings such an elevator within the scope of group 41 is too far-fetched to be justified by any canon of statutory interpretation.

This conclusion does not by any means import that compensation for injuries due to elevator accidents is not recoverable under the Workmen's Compensation Law; all that we decide is that in order to be recoverable it must appear that the elevator was used in one of the employments classified by the act as hazardous. The business of selling glassware is not a hazardous employment under the act.

The order of the Appellate Division should be reversed, with costs, and the claim dismissed.

HISCOCK, COLLIN, CUDDERBACK, HOGAN, SEABURY and POUND, JJ., concur. Order reversed, etc. *Wilson v. Dorfinger & Sons*, 218 N. Y. 84, April 25, 1916.

Upon authority of its opinion in *Wilson v. Dorfinger & Sons*, the Appellate Division had affirmed awards in four other elevator cases. Upon authority of its reversal in the *Wilson* case, the Court of Appeals reversed three of these. The cases are: *Sheridan v. Groll Construction Co.*, 171 App. Div. 958; 218 N. Y. Rep. 633; *McIntire v. Hilliard Hotel Co.*, 171 App. Div. 958; 218 N. Y. Rep. 642; *Chappelle v. Four Hundred and Twelve Broadway Co.*, 171 App. Div. 958; 218 N. Y. Rep. 632; and *Cremien v. Mordecai & Son*, 171 App. Div. 958.

An award to the dependents of a building superintendent who fell down an elevator shaft, April 25, 1915, was set aside by the Appellate Division without opinion: *Sterling v. Western Union Telegraph Co.*, S. D. R., vol. 5, p. 445; 173 App. Div. 990.

In May, 1916, the Legislature inserted the words "freight and passenger elevators" in § 2, group 22, so that elevators are now expressly under the law's coverage.

In the following case the Supreme Court, New York Special Term, denied defendant's motion for judgment on the pleadings on the ground that the plaintiff had incurred his injury in long-shore work:

NEWBURGER, J.: This action is brought under the Employers' Liability Act. The defendant moves for judgment on the pleadings on the ground that the case is covered by the Workmen's Compensation Law. It appears that the defendant is a domestic corporation and transacts part of its business in the building at No. 474 West One Hundred and Fifty-ninth street

and maintains an elevator in said building. The plaintiff was employed in the building as a range handler or helper, and he was required to assist in moving stoves and ranges in the building and to and from the defendant's wagons, and occasionally riding on said wagons to buildings occupied by customers of defendant. On January 13, 1915, while one of the defendant's wagons was in front of the building and close to the elevator, and while the plaintiff in the course and discharge of his duties was assisting in removing one of the stoves from the wagon onto the elevator, and had stepped on the tail-board for that purpose, the chains and tail-board gave way and the plaintiff fell and was injured. The defendant contends that this case comes within group 10 of section 2, chapter 41 of the Laws of 1914, which reads as follows: "Longshore work, including the loading or unloading of cargoes or part of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage." It is clear that the plaintiff was not engaged in longshore work nor in the handling of cargoes, nor was he then engaged in the handling of the same in any warehouse or other place of storage. It is clear from a reading of the section that it was the intention of the legislature to cover such cases as might arise in the removal of cargoes from ships and docks to warehouses, especially carried on for hire. In *Matter of Mihm v. Hussey*, 169 App. Div. 742, it was held that an employer in the wholesale business who, in connection therewith, maintains a place in which to store his goods is not engaged in warehousing within the meaning of the statute. The case is not covered by group 10 of section 2 of chapter 41 of the Laws of 1914, and therefore the motion herein must be denied. Motion denied. *Gutheil v. Consolidated Gas Co.*, 94 Misc. 690, April, 1916.

*c. Injuries in employment included under Workmen's Compensation Law, § 2, if certain contingencies are present.*—The presence of certain contingencies either excludes operation of the Workmen's Compensation Law altogether or permits alternative action under the law of negligence to an employee sustaining accidental injury in employment under some one of the groups enumerated in Workmen's Compensation Law, § 2.

Of the instances in this class two are presented below, pp. 298–300, 315–327, *i. e.*:

1. *Provision not in schedule.*—Compensation is not provided in the schedule of Workmen's Compensation Law, § 15, as illustrated by the case of Shinnick, the employee disfigured through loss of an ear; and

2. *Right of non-dependent survivors to recover.*—The employee dies from the accident and leaves surviving a person or persons not dependent under Workmen's Compensation Law, §

16, and entitled to recover under the law of negligence, as illustrated by the case of Shanahan, an adult sister who successfully instituted action under § 1902 of the Code of Civil Procedure for pecuniary loss through the death of her brother who had been killed in the service of a firm that had workmen's compensation insurance.

The second of these two instances has been directly and decisively eliminated by the Court of Appeals, reversal of the Appellate Division's decision in the Shanahan case, below, pp. 321-327. This opinion in all probability indirectly eliminates the first instance also.

Other instances are:

3. *Farm laborers and domestic servants.*—The injured employee, if a farm laborer or domestic servant, is not entitled to compensation (Workmen's Compensation Law, § 3, subd. 4). No cases involving these two classes of employees, appear to have reached the courts upon appeal.

4. *Failure to insure.*—If the employer has failed to take out compensation insurance, the injured employee may elect either to present a claim for compensation to the Commission or to institute an action for damages in the courts (Workmen's Compensation Law, § 11). In *Miller v. N. Y. Railway Co.*, above, p. 52, the court holds that filing of a claim for compensation debars action for damages. In the following case of *Lindebaur v. Weiner*, County Court of Niagara County, the court holds that if the injured employee elects to institute an action for damages, he must allege fault on the part of the defendant:

FISH, J.: Motion for judgment on the pleadings pursuant to section 547 of the Code of Civil Procedure. The action is by servant against master to recover damages received in assisting in the operation of a threshing machine while in the employ of the master. The complaint alleges that the plaintiff was employed by the defendant to assist in the operation of a threshing machine; that in October, 1914, while the plaintiff was in such employ, working upon such machine, assisting in the operation and standing upon the steps thereof, the defendant caused a threshing engine to be backed up against and upon the plaintiff in such a manner as to crush plaintiff's left leg against an iron bar thereby injuring such leg; then follow allegations as to the extent of such injuries and that the plaintiff was compelled to incur expenses for medical aid and treatment also that the defendant had not secured compensation as provided in section 50 of the Workmen's Compensation Law and that the plaintiff suffered damages in the sum of \$500 to recover which the action is brought.

There is no allegation of any negligence on the part of the defendant. The answer admits the employment and that the plaintiff was slightly injured but denies the extent of the injuries alleged in the complaint and denies that the plaintiff was compelled to incur expenses for medical aid and treatment. The answer in a separate paragraph alleges that the plaintiff was at the time under the influence of intoxicating liquors and that his injury was solely the result of his intoxication, also that the injury resulted solely from the plaintiff's own negligence and not from any act or omission of the defendant. The plaintiff demurred to the answer on the ground that it is insufficient in law to constitute a defense.

This action is brought as stated in the brief of plaintiff's counsel under section 11 of article 3 of the Workmen's Compensation Law; and it is claimed by plaintiff that the operation of a threshing machine is a hazardous employment within group 41 of section 2 of article 1 of the act, which reads as follows: "Group 41. The operation, otherwise than on tracks, on streets, highways or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules."

The sufficiency of a demurrer may in a proper case be tested by a motion under said section of the Code and an issue of law raised thereby tried upon the merits. *Delmar v. Kinderhook Knitting Co.*, 134 App. Div. 558; *Pomer v. Rosenberg*, 149 id. 272. This demurrer, however, must be overruled for the following reasons: (1) It is well settled that a demurrer to an answer for insufficiency will not lie if the plaintiff does not state facts sufficient to constitute a cause of action (*Baxter v. McDonnell*, 154 N. Y. 436), as "a bad answer is good enough for a bad complaint." There is no allegation in the complaint that the injuries complained of were occasioned by any fault of the defendant. At common law the liability of the master for an injury to his servant while engaged in the master's work is based on the fault of the master, and without fault there was no liability (*Ives v. South Buffalo R. Co.*, 201 N. Y. 272), and I do not think it was the intention of the legislature to change the common law in this respect as to the alternative remedy by action provided for in said section 11. In the very preceding section in prescribing liability for the compensation it is provided that every employer shall pay or furnish compensation in accordance with the act "without regard to fault as a cause of such injury;" and if it had been the intent to create an alternative remedy by action not based on the master's fault the legislature would have so stated. In such an action they expressly destroy the defense of contributory negligence, negligence of a fellow servant and assumed risk and make it unnecessary for plaintiff to plead or prove freedom from contributory negligence, so far they change the common law but no further. In so far as this statute provided for compensation to injured workmen it is to be construed with fair liberality to accomplish its beneficent purposes. *Matter of Petrie*, 215 N. Y. 335. Those purposes appear in the report of the Wainwright commission to the legislature of 1910 and are stated by Judge Woodward in *Matter of Rheinwald v. Builders' Brick & Supply Co.*, 168 App. Div. 425. The reason for the act rests upon a fundamental principle of government first advocated by Bismarck in Germany in about the year 1880 and later by Lord Salisbury in England; that fundamental principle is that in a modern industrial state the risk of injury to



workmen while engaged in the employer's service is a social risk, chargeable against the business itself, the losses arising from which are to be added to the productive cost and to be borne ultimately by the community at large. This principle has been generally accepted in Europe for years and is regarded by sociological writers as a forward step in the progress and development of a civilized state. It permits an injured workman or in the event of his death his dependents to demand as a right that which they were often compelled to ask as a charity with the ultimate costs in either event upon the community. The purposes of the act are to provide compensation for injuries sustained or deaths incurred by employees in the hazardous employments specified in the statute without regard to fault as a cause thereof. The plaintiff, however, does not seek compensation under the act, but avails himself of the alternative remedy by action in which his damages could be assessed by a jury and it is a well-settled rule that statutes will not be construed as changing the common law unless the intention to make such a change clearly appears. *Wood v. Tunnickliff*, 74 N. Y. 43.

(2) The answer denies the extent of the plaintiff's injuries and thus raises an issue of fact to be tried out.

It is unnecessary to determine at this time whether the operation of a threshing machine is a hazardous employment referred to in the Workmen's Compensation Law. That question would seem to depend upon whether it is a vehicle within the meaning of the term "other vehicles" as such term appears in said group 41.

Motion denied and demurrer overruled, with ten dollars costs. *Lindebauer v. Weiner*, 94 Misc. 612, March, 1916.

In *Dick v. Knoperbaum*, Appellate Term of the Supreme Court in the First Department, a similar point was made relative to negligence. In this case the court also held that the amount of damages recoverable against a third party bore no relation to the amount of compensation recoverable from the employer. The opinion was as follows:

LEHMAN, J.: The plaintiff has recovered a judgment for the sum of \$150 for injuries suffered while in the defendant's employ. The action is brought under section 11 of the Workmen's Compensation Act. The plaintiff under that section has an alternative remedy; he may claim compensation under the act or he may bring an action for damages. In the present case the plaintiff has evidently chosen the second alternative, and he is entitled, upon proof that the injuries occurred through the defendant's negligence, to a judgment for common-law damages. The contention of the defendant that in this action the plaintiff is confined to the rate of compensation fixed by the Workmen's Compensation Act is without merit.

The plaintiff must, however, prove that the injuries occurred through the negligence of the defendant. In this case the testimony of how the accident occurred is entirely unintelligible, and no inference can be drawn that it occurred through any negligence on the part of the defendant or any other person.

It follows that the judgment must be reversed and a new trial ordered, with \$30 costs to appellant to abide the event. All concur. *Dick v. Knopferbaum*, 157 N. Y. Supp. 754, March 13, 1916.

For further consideration of the employer's failure to secure payment of compensation, see below, pp. 232-235.

5. *Wilful injury*.—Workmen's compensation Law, § 10, debars an injured employee from compensation if the accident has been due to his wilful intention to bring about the injury or death of himself or of another. No case of this description has reached the court upon appeal. The following decision of the State Industrial Commission is in point:

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and decision, as follows:

On October 2, 1915, the day when Herman Ludwig received the injuries which resulted in his death, he resided at 185 Central avenue, West Hoboken, N. J., and was employed as an engineer by M. Groh's Sons, who were in the business of operating a brewery with a plant and place of business at 238 West Twenty-eighth street, borough of Manhattan, city of New York.

On said date while Herman Ludwig was working for his employer at his employer's plant, one August J. Pufahl, a former employee of the said brewery, came on to the premises and spent considerable time there talking to the employees, who were old friends of his. At about 7 p. m. Pufahl and Ludwig had a drink together and were friendly at that time. Pufahl continued to hang around talking to one Maurer who was Ludwig's fireman. Ludwig was in charge of the engine room and fire room. During the course of the evening Ludwig suggested to Maurer that Pufahl had been around long enough and should be ordered out. Maurer refused to order Pufahl out and told Ludwig that that was Ludwig's business. Pufahl heard that Ludwig was objecting to his presence and at about 10 o'clock p. m. went into the engine room where Ludwig was working and demanded of Ludwig his reason for wishing him (Pufahl) to leave the premises. Ludwig started to curse Pufahl and made disparaging remarks about Pufahl's father, who was then sick in the hospital, and told Pufahl to get out right away or he would throw him out. Pufahl told Ludwig to keep quiet and Ludwig picked up a wrench that was used on an ice machine, and said to Pufahl: "If it wasn't for your father, I would kill you." Pufahl answered: "If you are man enough, go ahead." Ludwig laid the wrench down and in a few minutes suddenly picked up the wrench and went for Pufahl. Pufahl struck Ludwig and knocked him down, thereby causing a fracture of the lower end of the tibia and fibula of Ludwig's right leg and multiple contusions of the head. Ludwig was taken to the hospital and he died there on October 14, 1915, of delirium tremens which had been brought on by the above injuries. Ludwig had a predisposed alcoholic condition which exposed him to developing delirium tremens.

The average weekly wage of Herman Ludwig was the sum of twenty-one dollars and sixty-three cents.

The injury which resulted in the death of Herman Ludwig was not an accidental injury and did not arise out of his employment, but was occasioned by the willful intention of Ludwig to bring about the injury of Pufahl.

Herman Ludwig left him surviving his widow, Elizabeth Ludwig, aged forty-seven years, his son, Herman Ludwig, aged seventeen years, his son, Henry Ludwig, aged sixteen years, and his daughter, Margaret Ludwig, aged twelve years, the claimants herein and no other child or children under the age of eighteen years.

The claim of Elizabeth Ludwig, widow, and Herman Ludwig and Henry Ludwig, minor sons, and Margaret Ludwig, minor daughter, of Herman Ludwig, deceased, against M. Groh's Sons, employer, and Brewers' Mutual Indemnity Insurance Company, insurance carrier, is hereby denied on the ground that Herman Ludwig did not come to his death by reason of an accidental injury arising out of his employment, but did come to his death through his own willful intention to bring about the injury of another person. *Ludwig v. Groh's Sons*, S. D. R., vol. 8, p. 426, April 1, 1916.

In *Ignatowsky v. Berman*, S. D. R., vol. 6, p. 327, the employee lost his life by an unwitnessed accident. The insurance carrier insisted that he had committed suicide. The State Industrial Commission found that there was no substantial evidence that he had killed himself.

6. *Accident due solely to intoxication.*—(Workmen's Compensation Law, § 10). Award of compensation was denied on account of intoxication of the injured employee in the case of a night watchman who was found lying helpless in his employer's plant and who died the day following: *Butler v. Sheffield Farms*, S. D. R., vol. 6, p. 368; and in the case of a night watchman who incurred a scalp wound from a fall: *Minnaugh v. Brooklyn Union Gas Co.*, S. D. R., vol. 8, p. 466.

Cases in which awards have been made have presented the question of alcoholism on the part of the injured employees. A keg, rolling off a brewery wagon, struck the driver in the leg. He was taken to a hospital and died nine days later of delirium tremens and alcoholic meningitis. Award was made to his dependents. *Dunn v. West End Brewing Co.*, S. D. R., vol. 5, p. 380.\* In *Kiernan v. Friestedt Underpinning Co.*, S. D. R., vol. 5, p. 390; 171 App. Div. 539, compensation was awarded to the dependents of a workman who appeared at his place of work in the morning in such condition due to drinking that his foreman

\* The award in the Dunn case was affirmed by the Appellate Division, June 30, 1916.

laid him off and who lost his life by a fall in leaving the place.\* An ice wagon driver, who had been a hard drinker for twenty-five years, was putting ice in a cellar. In connection therewith, he drank a glass of whiskey and part of a bottle of stout. He vomited what appeared to be blood, went home, became sick and six days later died in the hospital of delirium tremens. He stated to his wife, the doctors and a visitor that his ice tongs had slipped, causing a cake of ice to strike him in the abdomen. Relying upon the testimony to the accident, which was almost, if not altogether, hearsay, the Workmen's Compensation Commission found that "the primary and predominating cause of death was the injury to the abdomen, and the delirium tremens was a contributory cause in decreasing the resisting power of the individual." The Appellate Division affirmed the award. In a dissenting opinion reviewing the testimony at considerable length, Justice Woodward said:

"There is little that can be called convincing demonstration that the sole cause of death was not delirium tremens and attendant manifestations, or that 'injury' at any time had anything to do with Carroll's death in the alcoholic ward of Bellevue Hospital six days after the alleged misadventure with the ice tongs, but it can hardly be said that the Commission's findings that death was not principally and solely due to excessive use of alcohol was without evidence tending to sustain it." *Carroll v. Knickerbocker Ice Co.*, 169 App. Div. 456, September 15, 1915.†

Other cases involving intoxication and delirium tremens are *Berg v. Great Lakes Dredge & Dock Co.*, p. 80, above; *Sullivan v. Industrial Engineering Co.*, p. 250, below; and *Winters v. N. Y. Herald Co.*, p. 197, below.

7. *Injury through negligence of another not in the same employ.*—An employee injured through negligence of another not in the same employ or his dependents, if death results, may, in such manner as the rules of the State Industrial Commission prescribe, elect to bring an action for negligence against the third party in preference to making application against his employer for compensation (Workmen's Compensation Law § 29). According to an opinion of the Appellate Division, First Department, the action for negligence may be brought though the employee has failed to make such election. The opinion affirmed a

\* The Appellate Division's decision in the Kiernan case appears below, p. 195.

† The Carroll case was carried to the Court of Appeals where the decisions of the Commission and the Appellate Division were reversed, July 11, 1916. The full texts of the opinions are given below, pp. 367-374, 380-388. See also below, p. 250.

Supreme Court decision in which Judge Lehman, concurring, had said:

"It is urged, however, that since this section (§ 29) provides that 'such injured workman \* \* \* shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against the other' the plaintiff in this common-law action must plead and prove that he has made such election in the manner prescribed by the rule or regulation of the commission. It seems to me, however, that such a construction of this section is forced. The law requires an election only 'before any suit or claim *under this chapter*' and the words which I have italicized refer to and limit both the words 'suit' and 'claim.' It seems to me that the words quoted, standing even alone, and the strict grammatical construction thereof, show that this was the meaning of the legislature, and the whole tenor of the statute shows that this was the legislative purpose. As stated above, the only liability which the legislature has attempted to deal with is the liability of the employer. The statute in no wise attempts to regulate or change the ordinary common-law liability of other parties for their own negligence, but since the employer is made liable for injuries without regard to his fault it properly provides that he, or the fund or person or corporation ultimately liable, shall be subrogated to the remedy which the employee may have against third parties provided the employee elects to take compensation under the statute, or if the employee elects to proceed against a third person who is liable as at common law for his negligence that such fund, person or corporation shall be liable to compensate the employee only for the deficiency between the amount of recovery actually collected and the compensation provided by the statute. The plain purpose of this section, it seems to me, therefore, is to give an employee injured through the negligence of a third party an election between a claim or suit against the employer under the new form of liability created by the statute and an election at common law against the negligent party; and inasmuch as the negligent party should in any event be the person ultimately liable and the employer should under no circumstances be held to a liability beyond the compensation fixed by the statute, the statute provides that the party seeking to obtain any benefit from the statute shall before suit or claim under the statute make his election as to the form of remedy he will pursue in order that the employer or the insurance fund shall not be forced to pay more than the established rate of compensation and shall be in a position to set off against this liability any recovery which can be enforced against a negligent third party. The very purpose of this section appears in the title of this section, viz.: 'Subrogation to remedies of employee.' I can see no reason why this section should be so construed as to provide that an employee desiring to sue a third party must before bringing such action file as a condition precedent to enforcing his common-law rights an election to make his claim at common law. If we so construe the statute it seems to me that we must hold that the legislature has placed persons employed in certain hazardous occupations in one peculiar class not only as regards their rights against their employers where there is good ground for such classification but also as against third parties guilty of negligence where I can find no possible ground for such classification. The third party sued as at

common law is in any event liable either to the injured employee or to his assignee and in no event is he liable to both. As far as such person is concerned it is quite immaterial whether an election has been made or not and we should not, I think, construe this statute in such manner as to limit the injured party's common-law right by requiring him to do any act under the Workmen's Compensation Act in order to enforce a liability which exists at common law. If the legislature had intended to derogate in this particular from the common law it would have so provided in an explicit manner." *Lester v. Otis Elevator Co.*, 90 Misc. 655-657, June, 1915.\*

Even if the injured employee elects compensation under the chapter the third party does not escape liability, for in such case the employee must assign his cause of action to his employer's insurance carrier (Workmen's Compensation Law, § 29). But, while the employee is limited by no fixed maximum of recovery in case he elects an action for negligence, the employee's assignee insurance carrier, when the employee elects compensation, is limited to a recovery from the third party not greater than the compensation that the employee receives. The Supreme Court, Appellate Term, First Department, has so held in the case of an employee injured by collision of a street car with his employer's truck on which he was riding. The court said:

GUY, J.: On or about July 20, 1914, Philip Magrino sustained injuries in a collision between his employer's truck, upon which he was riding, and one of defendant's street railway cars. The employee subsequently elected to take compensation under the Workmen's Compensation Law, and accordingly, pursuant to section 29 of that act, assigned his claim against the defendant to the plaintiff, the insurance corporation liable for the payment of the compensation. As assignee the plaintiff brought this action, and the trial court granted a nonsuit for the sole reason that, in the opinion of the court, the plaintiff in an action of this character is entitled merely to be indemnified for the compensation paid under the law to the injured employee, plaintiff having waived any such recovery and insisted upon the right to recover the same damages which the employee would have been entitled to if he had sued the defendant.

That part of the Workmen's Compensation Law applicable is section 29, which reads: "Subrogation to remedies of employee. If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such

\* For the full text of this decision and of the Appellate Division's decision, see below, pp. 222-232.

other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association or corporation liable to pay the same."

The learned trial justice regarded the use of the word "subrogation" by the legislature as controlling in the disposition made of the controversy. It is contended by the appellant that while ordinarily the word "subrogation," in technical parlance, connotes indemnification, the title of the section under consideration being "subrogation to remedies of employee," indicates that subrogation is used in its primary sense of substitution, so that the state or private insurer is after election made to resort to the act put in the same place the employee would have been if he had not availed himself of the provisions of the statute; and that the further provision that the "cause of action" shall be assigned to the insurer carries with it the right to recover, under such assignment, all damages recoverable by the workman in the absence of an assignment. We do not consider this contention sound. "'Cause of action' implies a right to bring an action, and some one who has a right to sue and some one who may be lawfully sued." *Patterson v. Patterson*, 59 N. Y. 574. The clause, read in conjunction with the title of the section, does not necessarily import a right on the part of the insurer, under his assignment, to recover all the damages which the workman might recover if he elected to pursue his remedy against the third party tortfeasor, but only such recovery as is consistent with the purpose clearly defined in the title, i. e., the purpose of "subrogation." *Lester v. Otis Elevator Co.*, 90 Misc. Rep. 649. Subrogation is defined in the Standard Dictionary as follows: "The succession or substitution of one person or thing by or for another; in the place of the creditor to whom he has paid it, so that he may use for his own indemnification all the rights and remedies that the creditor possessed as against the debtor."

"The insurer, upon paying to the assured the amount of a loss \* \* \* insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss." *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235.

The general purpose of the statute is to establish a system of state insurance of employees engaged in hazardous employment, and to provide in connection therewith a system of indemnification of the state. That it does not contemplate an accumulation of surplus profits to be derived from assignments of causes of action for personal injuries is made evident by an examination of the provisions of sections 95 to 97, both inclusive. Section 95 provides that the premium rate shall be "at lowest possible rate consistent with

the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve; and for such purpose (the commission) may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each individual risk." Section 96 permits the formation of employers' associations for accident prevention, and provides that "Every such approved association may make recommendations to the commission concerning the fixing of premiums for classes of hazards, and for individual risks within such group." Section 97 provides for the keeping of a detailed system of accounts as to each group or class of employment, and for a readjustment, at certain fixed periods, of the rates for each particular class; and where it appears that the payments in any particular class or group have, after appropriate credits to the surplus and reserve funds, exceeded the amount of disbursements for that particular class, vests in the commission the discretion to credit each individual employer of such group or class with a proportionate amount of such excess upon the next payment of premiums which may become payable to him; and further provides, in subdivision 4, that where premiums are paid by the employer upon an estimated amount of wages, and it subsequently appears that the actual wages paid are less in amount than the estimate, such employer shall be entitled to receive a refund of such excess from the state insurance fund, or to have the amount of such excess credited on subsequent premiums as they become due. These provisions are in harmony with the amendment of the act (Laws of 1914, chap. 16) requiring premium rates of corporations and associations transacting business under the act to be approved by the state superintendent of insurance "as adequate for the risks," i. e., the liability to which such corporation or association may be subjected under its policy.

Construing section 29 in the light of the general purpose of the statute, it is evident, therefore, that the provision for "Subrogation to remedies of employees," and the assignment of the workmen's cause of action to the state, is for purpose of indemnification only; and it follows that the extension of the same provision to individual or corporate insurers is subject to the same limitation, namely, the full indemnification of the insurer, and no more. To hold otherwise would be to construe the act as requiring repayment by the state to employers of surplus funds derived from the prosecution of negligence cases by the state as the absolute assignee of injured employees, and permitting the retention of the surplus obtained in such cases by individual or corporate insurers. The statute surely does not contemplate the granting to individual or corporate insurers of rights inconsistent with the rights vested in the state under like conditions and inconsistent with the general purpose of the statute to be so construed as to open the door for speculative profit to the insurer, through subsequent litigation. Under both the common, as recognized in this state, as well as under the Personal Property Law (§ 41, subd. 1, formerly Code Civ. Pro. § 1910), a claim or demand to recover damages for personal injury is not transferable, and while there can be no question of the power of the legislature, by subsequent enactment, to specifically or impliedly repeal such provision of the Personal Property Law, the rules of statutory construction require that, so far as possible, the later enactment shall be construed harmoniously with existing law, and, so far as the later enactment modifies the existing law, it shall be limited in its applicability to the particular purpose for which the later statute was enacted.



*Kirby v. State of New York*, 68 Misc. Rep. 626, 633. See, also, *Howe v. Peckham*, 10 Barb. 656. "When the intention can be collected from the statute, words may be modified, altered or supplied so as to obviate any repugnancy or inconsistency with such intention." 2 Lewis Suth. Statut. Const. (2d ed.), § 347. "The intention of an act will prevail over the literal sense of its terms." *Id.*, § 348. "The presumption is that the law maker has a definite purpose in every enactment, and has adapted and formulated the subsidiary provisions in harmony with that purpose. \* \* \* *That purpose is an implied limitation on the sense of general terms.*" *Id.*, § 369. "Words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions." *Id.*, § 376. "A thing which is not within the intent and spirit of a statute is not within the statute, though within the letter." *Id.*, § 379. "The real intention, when accurately ascertained, will always prevail over the literal sense of terms. \* \* \* Statutes are likewise to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required." 1 Kent's Comm. (14th ed.), 462.

The purpose of the statute now under consideration being the establishing of a self-supporting state insurance fund for the compensation of employees in certain classes of employment and for the fixing of the lowest possible premium rates for employers consistent with such purpose, section 29 must be construed to that extent only as impliedly repealing or modifying the existing law as to the nontransferability of claims of this character. It is also a significant feature supporting this construction of the statute that notwithstanding the previous enactment of statutes in California, Connecticut, New Jersey, Massachusetts and other states, containing provision for part payment to the injured employee, or for the retention in the state insurance fund of any surplus amount collected by the insurer in excess of indemnification, no such provision is found in the present statute.

The judgment should, therefore, be affirmed, with twenty-five dollars costs. PAGE and PHILBIN, JJ., concur. Judgment affirmed, with twenty-five dollars costs. *U. S. F. & G. Co. v. N. Y. Railways Co.*, 93 Misc. 118, January, 1916.

The provision of Workmen's Compensation Law, § 29, permitting the dependents of an employee whose injuries have resulted in death to recover death damages as an alternative to workmen's compensation does not in every case operate for the benefit of all the dependents enumerated in Workmen's Compensation Law, § 16. Code of Civil Procedure, § 1903, relative to death damages, provides that "in case the decedent shall have left him surviving a wife, or husband, but no children, the damages recovered shall be for the sole benefit of such wife or husband." This excludes the dependent grandchildren, parents, grandparents, brothers and sisters made beneficiaries by Workmen's Compensation Law, § 16, subd. 4. Such dependents, when the husband or wife survives, must rely only upon contingent

compensation provided by Workmen's Compensation Law, § 16, and therefore the right to claim and receive this compensation according to the following opinion of the Appellate Division is not affected by a suit for damages instituted by the surviving husband or wife against the third party:

COCHRANE, J.: The State Industrial Commission has certified the following question: "May an award of compensation be made to Mary Cahill, mother of James J. Cahill, deceased, upon proof of her dependence upon the said James J. Cahill, deceased, at the time of the accident, in view of the fact that Jennie Cahill, his widow, as a dependent and as the administratrix of the estate of James J. Cahill, deceased, has elected under the provisions of section 29 of the Workmen's Compensation Law to commence a suit for damages against a third party not in the same employ, and such suit is now actually pending and undetermined?"

The action instituted by the widow of the deceased for damages against the third party can in no event benefit the dependent mother. The action is not brought for her benefit. The damages, if any, awarded in that action cannot include compensation to the mother. (Code Civ. Proc. §§ 1903, 1904.)

By section 16, subdivision 4, of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1909, chap. 41], as amd. by Laws of 1914, chap. 316), in a case where the injury to a workman causes his death, "if the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased" a dependent parent may receive fifteen per centum of such wages during such dependency. "But in no case shall the aggregate amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband) or for the support of surviving child or children."

Section 29 of the Workmen's Compensation Law provides in part as follows: "If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the Commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the State for the benefit of the State insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the State insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case."

In this case the dependent mother has no remedy against the third party and can in no event be benefited by the action instituted by the widow. She has no choice of remedies; she has no opportunity for an election; she has

no redress for any grievance against any party except under subdivision 4 of section 16 of the Workmen's Compensation Law above set forth. Clearly section 29 of that law has no application to such a case. When it provides that the dependent of a deceased employee shall elect whether to take compensation under the Workmen's Compensation Law or "to pursue his remedy against such other" it means such a dependent as has such a remedy and who can, therefore, make such an election. And when the statute provides that the person electing to take compensation thereunder shall assign his cause of action against a third party, it means a person who has a right of election and who has something which he can assign. And the deficiency which the State insurance fund, person or association or corporation shall contribute means the deficiency representing the difference between the amount recovered against the third party and the "compensation provided or estimated" by the Workmen's Compensation Law for those who are benefited by or interested in such recovery. Such a person in the present case is the widow and perhaps others who will benefit by the action instituted by her for their benefit as well as her own. But the mother in this instance has no interest in the litigation against the third party and has no claim except such as is created by the Workmen's Compensation Law against the insurer. The person possessing a cause of action against a third party cannot by proceeding against such third party arbitrarily destroy the claim of one whose only protection is under the Workmen's Compensation Law against the insurer. The insurer is not prejudiced. His liability is to various classes of people dependent on the deceased. Some of those dependents but not all have a cause of action against a third party. Those who have such cause of action may pursue it and the employer thereby derives a benefit because the amount of the recovery extinguishes in whole or in part, as the case may be, his liability to those of the claimants who are benefited by the action thus brought. His liability to the claimants not thus benefited is neither increased nor diminished. If in the instant case the widow succeeds in her action against the third party her success will inure to the benefit of the insurer so far as she and those represented by her in her action against the third party are concerned. But whether she succeeds or fails the result will be the same to the insurer so far as the dependent mother is concerned. Within the limitations of said section 16, subdivision 4, the liability of the insurer to the mother is entirely independent of the claim of the widow and will remain the same independently of the result of the action instituted by her against the third party. The amount of the payment to the dependent mother can be fixed definitely and accurately and in no respect depends on either the fact or the amount of the recovery in the action of the widow against the third party. Section 29, so far as it provides for an election of remedies, relates only to such dependents as have an election or may be benefited or affected by an election, and does not include a case like this where the dependent mother possesses no right of election herself nor can be benefited by an election of some other person. To hold otherwise would have the effect of destroying the liability of the insurer to this mother, provided the widow recovers in her action against the third party as much as the entire benefits under the Workmen's Compensation Law. The meaning of the statute is that in such an event the insurer should be relieved of liability to those who receive full compensation from the third party, but it would be a

growing out of and directly connected with such employment. Whether the employer might be held liable as a third party where he was the responsible cause of an employee's injury through agencies controlled by him, which were entirely separate, apart and distinct from the employment of the injured employee, may be an interesting academic question, but has nothing whatever to do with this case. The concession that plaintiff has a right of action against the defendant as his employer under the Workmen's Compensation Law carries with it the assumption that the injury occurred in the course of and connected with plaintiff's employment by the defendant. But were there any doubt on that point, it is entirely removed by the further stipulation entered upon the record, that "at the time of the accident plaintiff was engaged in handling merchandise of the defendant, in the defendant's business," and this is supplemented by further proof that the elevator was the appliance furnished by the employer for the use of his employee in the performance of his duty in delivering the barrels of beer at the place where he was instructed to deliver them by his employer. The judgment should be affirmed.

Judgement reversed and new trial ordered, with thirty dollars costs to appellant to abide event. *Winter v. Doelger Brewing Co.*, 95 Misc. 150, May, 1916.

When the injury is attributable to another not in the same employ and the injured employee has made claim for compensation and received an award, he cannot thereupon bring an action against the third party for damages. "There should not be a double satisfaction for the same injury." The plea that he has received compensation is a good defense in an action for negligence, notwithstanding that compensation comes through insurance and that compensation and damages are determined by different data. The point has been determined by the Appellate Division in *Miller v. N. Y. Railways Co.*, the text of which appears above, p. 52.

According to *Herkey v. Agar Manufacturing Co.*, above, p. 32, an injured minor employee may make the election permitted by Workmen's Compensation Law, § 29, without appointment of a guardian *ad litem*.

According to *Woodward v. Conklin & Son*, below, p. 336, release of a third party by the injured employee, with or without consideration, does not debar the employee from compensation or the employer's insurance carrier from an action for negligence.

8. *Employment not conducted for pecuniary gain.*—An employee injured in a trade, business or occupation not carried on

for pecuniary gain must look to the law of negligence for any remedy that he may have against his employer. The Workmen's Compensation Law, by its own terms (§ 3, subd. 5), applies to an employment enumerated in § 2 thereof only if such employment is "carried on by the employer for pecuniary gain." By L. 1914, ch. 316, the Workmen's Compensation Law was so amended as to make "the state and a municipal corporation or other political subdivision thereof" an employer under its terms. But public corporations very rarely conduct the operations enumerated in Workmen's Compensation Law, § 2, or any other operations, for pecuniary gain. Therefore the Attorney-General ruled that the right of compensation under the Workmen's Compensation Law accrued to a comparatively small number of state and municipal employees. Accordingly, the State Industrial Commission denied compensation to a carpenter on a state canal lock, whose eye was destroyed by a splinter flying from his hammer, *Jennings v. Dept. of Public Works of N. Y.*, S. D. R., vol. 5, p. 416, and to the dependent mother of a state highway foreman killed while steering the tongue of a concrete mixer, *Allen v. State of New York*, S. D. R., vol. 6, p. 376. The Appellate Division affirmed the Allen decision, June 30, 1916. The text of the opinion is presented below. The Attorney-General's opinion was as follows:

The Workmen's Compensation Law in its application to the State, its municipal corporations and other political subdivisions thereof, comprehends only those hazardous employments classified in section 2 of the law.

The restrictions of the term "employment," as defined in the act, is applicable to the State, its municipalities and other political subdivisions.

### INQUIRIES

From the Chairman of the State Workmen's Compensation:

"What was the effect of the amendment to the Workmen's Compensation Act by chapter 316 of the Laws of 1914, to subdivision 3 of section 3 of such act, striking out the exclusion of the State, a municipal corporation or other political subdivision, and substituting therefor their inclusion?

"Specifically, what employees of the State and its political subdivisions are in your opinion covered, that is, whether all employees, or only such as are engaged in the hazardous employments set forth in section 2 of the act?

"Also, specifically, whether the provision of subdivision 5 of section 3 applies limiting employment to 'a trade, business or occupation carried on by the employer for pecuniary gain?'"

## OPINION

When the Workmen's Compensation Law was enacted in 1913 by chapter 816 of the Laws of that year it contained as a definition the following:

"'Employer,' except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments; *but does not include the state or a municipal corporation or other political subdivision thereof.*"

By chapter 316 of the Laws of 1914, this definition was amended to read as follows:

"'Employer,' except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments *including the state and a municipal corporation or other political subdivision thereof.*"

The effect of this amendment was to do away with the provision contained in the original enactment excepting the State, its municipalities and other political subdivisions from the operation of the law, and to substitute therefor a definition expressly including them in the act as amended. There was, however, nowhere any provision increasing the liability of the State or its municipalities or other political subdivisions beyond that provided as to private corporations and individuals. The State and its political subdivisions were brought within the same class as other employers previously made liable.

It therefore follows that all the provisions of the act are applicable to the State and its political subdivisions. There is no liability created as against the State or its political subdivisions except that created by section 2 of the act as to hazardous employment therein in detail classified.

The term "employment," defined in subdivision 3 of section 3 as follows:

"'Employment' includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain," is applicable to the State, its municipalities and political subdivisions. It may very properly be urged that there are not many occupations carried on by the State, its municipalities and political subdivisions for pecuniary gain, but only so far as there are such occupations has the statute included the State and its political subdivisions within its provisions.

There is no liability created by this act except by virtue of its provisions, and it cannot logically be urged that a statute which expressly limits its application to certain employments can be extended to include other employments.

When by the amendment of 1914 the State and its political subdivisions were included within the definitions of "employer," no greater or different liability was imposed than that provided by the statute itself as to employers in general.

When the Legislature placed these governmental agencies *within* the duties and liabilities of the law it cannot be said to have thereby extended the measure of their obligations *beyond* such duties and liabilities. *Opinion of Attorney General, June 9, 1914.*

Amendments of L. 1916, ch. 622, to the Workmen's Compensation Law, adding group 43 to § 2 and altering subd. 5 of § 3, have excepted public employees, and employees brought under the Workmen's Compensation Law by election jointly with their employers, from the "pecuniary gain" limitation. The Attorney-General has interpreted the exception of public employees in an opinion dated July 3, 1916, in which he has specifically held that towns must provide compensation insurance for their highway employees and has generally held that the state and its municipal corporations must provide compensation insurance for all their employees who are engaged in the hazardous employments enumerated in Workmen's Compensation Law, § 2. The State Industrial Commission has passed a resolution permitting the State or a municipal corporation to become a self-insurer, so that lack of an appropriation for insurance premium does not stand in the way.

This second opinion of the Attorney-General, construing the application of the law to public employees, was as follows:

#### INQUIRIES

The State Commissioner of Highways and various town superintendents of highways and other town and city officers have submitted inquiries as to the effect of the amendment to the Workmen's Compensation Law by chapter 622 of the Laws of 1916 in its application to the employees of the State, its municipal corporations and other political subdivisions thereof.

#### OPINION

Chapter 816 of the Laws of 1913 which originated the present Workmen's Compensation Law of this State defined the term "employer" as not including the State or a municipal corporation or other political subdivision thereof. (L. of 1913, chap. 816, § 3, subd. 3.)

By chapter 316 of the Laws of 1914, the definition of "employer" was amended to read as follows: "'Employer' except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments *including* the State and a municipal corporation or other political subdivision thereof."

The term "employment" was, however, defined in subdivision 5 of section 3 of the Compensation Law as follows: "'Employment' includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain."

On June 9, 1914, the matter of the application of the Compensation Law to the State, its municipalities and political subdivisions was considered by Attorney-General Carmody and an opinion was rendered by him to the effect that these two definitions had to be harmonized and that the restrictions of the term "employment" were applicable to the State, its municipalities and political subdivisions and that their employees were only subject to the Compensation Law so far as they were engaged in an employment carried on by the State or municipality or other political subdivision for pecuniary gain. (Attorney-General's Opinions, 1914, p. 191.)

By chapter 622 of the Laws of 1916, the Workmen's Compensation Law has been amended by adding to section 2 thereof, a new group known as Group 43 which reads as follows: "Group 43. Any employment enumerated in the foregoing groups and carried on by the State or a municipal corporation or other subdivision thereof, notwithstanding the definition of the term 'employment' in subdivision 5 of section 3 of this chapter."

The Legislature has thus clearly brought within the provisions of the statute any employees of the State or a municipal corporation or other subdivision thereof who are engaged in any of the hazardous employments set forth in groups 1 to 42 of section 2 of the Compensation Law irrespective of the fact whether the State or a municipal corporation or other political subdivision is engaging in the trade, business or occupation for pecuniary gain.

It is therefore clearly the duty of the proper officers of the State, its municipal corporations and other political subdivisions to examine the various groups of employment covered by the act as set forth in section 2 thereof and to secure the payment of compensation to such employees as may be covered thereby in one of the ways provided by the statute.

Section 50 of the Compensation Law provides that an employer shall secure compensation to his employees in one of the following ways:

"1. By insuring and keeping insured the payment of such compensation in the State Fund, or

2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this State. If insurance be so effected in such a corporation or mutual association, the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association and such information regarding the policies as the commission may require.

3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in Section 13 of the Insurance Law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter. The Commission shall have the authority to revoke its consent furnished under this section at any time for good cause shown." (Workmen's Compensation Law, § 50, as amended by Laws of 1916, chap. 622.)

I have been specifically asked whether the employees of the town superintendent of highways of a town are covered by the Workmen's Compensation Law. It is my judgment that it is compulsory for a town to provide compensation insurance for the workmen employed upon the highways of the



town. This seems to be expressly covered by Group 13 which reads as follows:  
 "Group 13. Paving; road building, curb and sidewalk construction or repair;  
 . . ."

I have also been asked as to what fund may be used for the payment of such compensation insurance. In view of the fact that State and municipal employees have not been considered heretofore as coming within the provisions of this statute except in the isolated cases where the State or a municipality might be deemed to be carrying on an occupation for pecuniary gain, it must be assumed that the various municipalities of the State have not made provision for the payment of the premiums for such insurance in the annual budget for the current year. No moneys are available in such cases unless embraced in some contingent fund or unless special authority has been granted by statute which has not come to my attention. I am informed by the State Industrial Commission that a resolution has been passed by that commission permitting the state, its municipal corporations and other political subdivisions to become self-insurers which seems to me to be the only practical solution available at this time. It is therefore to be assumed that upon the application to the State Industrial Commission by the proper officials of any municipal corporation or other political subdivision of the State permission will be granted to secure compensation to the employees of such municipal corporation or other political subdivision engaged in any of the hazardous employments covered by the act through the method known as self-insuring. If the State or any municipal corporation or other political subdivision desires to adopt one of the other methods of insuring for the ensuing fiscal year, it will have to do so by making suitable provision therefor in its next budget.  
*Opinion of Attorney-General, July 3, 1916.*

Though the above cited amendment bringing public employees within the law's coverage has offset *Allen v. State of New York* as a precedent, the text of the case is inserted here as a matter of complete presentation of the subject:

WOODWARD, J.: On the 20th day of October, 1915, Charles R. Allen was in the employ of the Highway Department of the State of New York and engaged as a foreman of a concrete gang, which was doing maintenance and repair work on state road No. 5338A, in the town of Sanford, Broome county. The State, for reasons which are set forth in the record, was doing its own repair work by its own equipment and force, and the Commission found as a fact that the decedent received his injuries while he was employed as a foreman of a concrete gang of the State Highway Department of Maintenance and Repair, which department had charge of the maintenance and repair of the State and county highways; also that the deceased, at the time he was injured, was steering the tongue of a concrete mixer, the front wheel of which struck a plank and threw him against a section of the concrete wall, fracturing his skull, resulting in his death on the following day; that the injuries were accidental, resulting out of and in the course of his employment, and that his average wages were twenty-three dollars and eight cents per week, and that the claimant, his mother, was dependent upon him for support. Having found these facts, the Commission refused to allow the claim on the

ground that the State of New York, through its Highway Commission, was not engaged in business for pecuniary gain. The claimant appeals from this determination.

We quite agree with the appellant's assertion that "by the amendment of subdivision 3 of section 3 of the Workmen's Compensation Law (chap. 316, Laws 1914)\* the State is included within the meaning of the word 'Employer' as used in that statute, and its stands in no different position with respect to this law than any other employer," but it by no means follows that the Commission erred in its ruling, for the statute provides in subdivision 5 of section 3, which has not been amended, that "'employment' includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain," and no one can, within the meaning of the Workmen's Compensation Law, be an employer unless he is "employing workmen in hazardous employments," and such employments are only those which are carried on for pecuniary gain. The statute, which required an amendment of the fundamental law of the State to give it vitality (State Const., art. 1, § 19, as amd. in November, 1913; *Ives v. South Buffalo R. Co.*, 201 N. Y. 271), does not undertake to pay compensation to those injured in all hazardous employments, but only to those engaged in the particular employments pointed out by the statute, and these are in turn limited by the definition of the word "employment" to "a trade, business or occupation carried on by the employer for pecuniary gain." We cannot close our eyes to these limitations; we cannot charge an individual, association or corporation with responsibility for accidents occurring in occupations, however hazardous, unless those occupations are embraced within some of the groups enumerated in section 2 of the law, nor unless they are being carried on for "pecuniary gain." This is not only the letter of the law but it is the spirit of the underlying constitutional provision above cited, which authorizes this class legislation "provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer." (State Const., art. 1, § 19.)

The theory of the law, and of the underlying constitutional authorization, is that the accidents growing out of the operation of industrial enterprises become a legitimate part of what is known in commercial life as the "overhead" cost, the same as the breakage, wear and tear of machinery and equipment, and it is only in those industries which are carried on for pecuniary gain that "the cost of operating the business" can be taken care of in the fixing of the price of the product. (See *Ives* case, p. 286; State Const., art. 1, § 19.) No provision has ever been made, so far as we are informed, for the State to take care of the accidental injuries of employees in the maintenance of State highways; no suggestion of any method is made by which the cost of the injuries can be added to the "cost of operating the business," and it is only where this may be done that the statutes are within the provisions of the Constitution. By confining the statute to the limitations fixed by the definitions found in section 3 of the act, the law becomes harmonious with the letter and the spirit of the Constitution, while the construction contended for by the appellant would defeat such harmony and make the act itself questionable, to say the least. It is true, of course, that where the

\* Consol. Laws, ch. 67 (Laws of 1914, ch. 41), § 3, subd. 3, as amd. by Laws of 1914, ch. 316 — [Rep.]

State contracts for work of a hazardous nature, as defined in the statute, the contractor, who carries on the work, is called upon to provide for these accidents, for he is carrying on the business for pecuniary gain, but he is enabled to include this charge in his contract price of the work to be performed, but no such power is given to the Highway Commission in carrying on the work of maintaining the highways, and as it is not engaged in this work for the purposes of pecuniary gain it cannot be that the State is to become an insurer of its employees, under conditions where such insurance would not be required of an individual, association or corporation. If the State was operating the highways, as it might operate a railroad (*Olcott v. Supervisors*, 16 Wall. 678; *East Alabama Railway Company v. Doe*, 114 U. S. 340, 350), there would be an opportunity for the collection of fares and tolls, and it would be operated for pecuniary gain; but by the mere governmental act of maintaining the highways it does not come within the provisions of the statute, and the Commission properly refused to grant the award demanded.

In June, 1914, immediately after the passage of the act, the then chairman of the State Workmen's Compensation Commission addressed a letter to the then Attorney-General of this State asking "specifically whether the provision of subdivision 5 of section 3 applies limiting employment to 'a trade, business or occupation carried on by the employer for pecuniary gain,'" and in answering that question the learned Attorney-General aptly says: "There is no liability created by this act except by virtue of its provisions, and it cannot logically be urged that a statute which expressly limits its application to certain employments can be extended to include other employments. When by the amendment of 1914 the State and its political subdivisions were included within the definition of 'employer,' no greater or different liability was imposed than that provided by the statute itself as to employers in general. When the Legislature placed these governmental agencies within the duties and liabilities of the law it cannot be said to have thereby extended the measure of their obligations beyond such duties and liabilities." (*Matter of Workmen's Compensation Law*, sections 2 & 3, 2 State Dept. Rep. Off. 568.) This seems to us the logical and complete answer to the appellant's contention. The amendment simply placed the State and its local political subdivisions upon the same footing as individuals and corporations, and the fact that the State may not conduct any business for pecuniary gain has no more bearing on the proper construction of the law than the fact that many individuals and corporations do things of a hazardous character without the purpose of pecuniary gain. The State has the power to engage in business undertakings for the purpose of securing pecuniary gain; the fact that it does not do so does not tend to show that the Legislature intended to increase the liability of the State beyond that of corporations and individuals, and it is not the province of the courts to enlarge upon the clearly expressed or necessarily implied scope of statutes changing the rules of the common law.

The determination appealed from should be affirmed. All concurred, except HOWARD, J., who dissented. Determination affirmed. *Allen v. State of New York*, 173 App. Div. 460, June 30, 1916.

In two decisions handed down on the same day, November 10, 1915, the Appellate Division made an interesting, important and somewhat unexpected application of the "pecuniary gain" clause.

It denied compensation in *Mihm v. Hussey* to a shipper, a regular employee, whose fingers had been crushed while he was tiering barrels of vinegar in the private storehouse of his employer, a wholesale produce merchant, and in *Bargey v. Massaro Macaroni Co.* to the widow of a carpenter, a temporary or casual employee, killed in the collapse of a factory building while he was at work upon a partition. The court held in each case that the employer was not carrying on for the "pecuniary gain" of the statute the work in which his employee sustained the injury. The produce merchant, it said, was not engaged in the hazardous employment of "warehousing" (§ 2, group 29) because he was not storing the goods of others for hire and the macaroni company was not engaged in the hazardous employment of "structural carpentry" (§ 2, group 42) because it was "not carrying on the carpenter business or doing any carpenter work for profit." The Bargey opinion has been compared with the Rheinwald opinion, presented above under the caption "Injured person an independent contractor." The Rheinwald decision was handed down May 14, 1915; the Bargey decision, November 10, 1915. Both were by the same court. The injured painter, Rheinwald, was in the same status of casual or temporary employment as the injured carpenter, Bargey. The one was painting a sign, the other erecting a partition. Painting and carpentry are named in the same group, Workmen's Compensation Law, § 2, group 42. Both were at work for employers engaged in hazardous employments—manufacture of brick and preparation of food stuffs—enumerated in Workmen's Compensation Law, § 2, groups 19 and 33. The overshadowing issue in the Rheinwald case was whether the injured person was a contractor or an employee; the "pecuniary gain" issue does not appear to have been raised there, though there may be a hint of it in the court's declaration that Rheinwald's "casual or intermittent" employment "could not deprive him of the status of employee, in the absence of explicit legislative pronouncement to that effect" or in the reference to a minority opinion of the California Industrial Accident Commission "based upon apprehension of consequences against which the New York statute plainly guards, through the restriction of the term employment to 'a trade, business or occupation carried

on by the employer for pecuniary gain.'” If the macaroni company was not carrying on the carpentry work for pecuniary gain, it is difficult to see that the brickmaking company was carrying on the painting work for pecuniary gain and *vice versa*. It is true that a sign might be regarded as more directly gainful in character than a partition. It is also true that the use of part of the macaroni company's building as a saloon figured in the Bargey case.\* The Appellate Division remanded the Rheinwald case to the Commission with direction to make an award to Rheinwald, but reversed an award to Bargey. Justices Lyon and Howard dissented from the Rheinwald decision; Justice Woodward, from the Bargey decision. The Bargey case went on up to the Court of Appeals where the reversal was sustained, June 16, 1916, Judge Seabury dissenting. Meanwhile the Commission, in accordance with the Appellate Division's instructions, made an award to Rheinwald (S. D. R., vol. 7, p. 440, February 16, 1916). Appeal was taken from the award and the case came a second time before the Appellate Division which, on September 13, 1916, reversed the award and its own former decision without opinion, upon authority of the Court of Appeals' decision in the Bargey case. So that it would appear that workmen like Rheinwald and Bargey were not protected by the Workmen's Compensation Law as it stood prior to its amendment by L. 1916, ch. 622. Whether the changes affected by L. 1916, ch. 622, have brought such employees within the law's coverage awaits court determination. The amendment appended to Workmen's Compensation Law, § 2, providing that an employer and employee whose relationship is not covered by the act may nevertheless subject themselves to its provisions by joint election, offers a voluntary basis for situations of the Bargey and Rheinwald type.

The full texts of the Mihm and Bargey decisions, with the dissenting opinions, are as follows:

*(Mihm v. Hussey, Appellate Division)*

LYON, J.: The State Industrial Commission has certified to this court the question: “Was the claimant at the time of the injury engaged in a

\* The Workmen's Compensation Commission's conclusions state that “Bargey was working for his employer on the second floor of his employer's plant. A fire occurred upon the third floor causing the building to collapse and Bargey was crushed beneath the debris and killed.” S. D. R., vol. 4, p. 373. The Appellate Division's opinion states that the macaroni company “purposed making upon the ground floor of the part of the building repaired a saloon, and to use the second and third floor in its general business” and that Bargey “was in the saloon part, nailing lath to the studding over the door, when the accident occurred.” 170 App. Div. 104.

hazardous employment within the meaning of the Workmen's Compensation Law, and entitled to compensation as a result of injuries arising out of and in the course of such employment." The employer was engaged in the wholesale produce business, with an office at 348 Broadway, Albany, N. Y. In connection with said business, and upon said premises, he maintained a warehouse or place of storage in which the produce owned by him was kept in storage until sold at wholesale.

The claimant was in his employ as shipper, and on the 28th of September, 1914, while tiering barrels of vinegar, weighing about 500 pounds each, in the storehouse, his right hand was pressed against a brick wall, injuring the second and third fingers. The Commission has found that the injuries were accidental, arose in the course of employment, and were without fault of the employee.

The alleged hazardous employment in which claimant was engaged is embraced in group 29 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), which is as follows: "Milling; manufacture of cereals or cattle foods, warehousing; storage; operation of grain elevators."

The single question, therefore, for decision is whether the claimant was engaged in the "employment" of "warehousing" at the time he sustained his injuries. Warehousing is defined in the Century Dictionary as "1. The act of placing goods in a warehouse. 2. The business of receiving goods for storage." "'Employment' includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain." (Workmen's Compensation Law, § 3, subd. 5.)

Claimant's employer was not carrying on the business of warehousing for pecuniary gain, hence the submitted question should be answered in the negative.

All concurred, except KELLOGG, J., who dissented in opinion, in which HOWARD, J., concurred.

KELLOGG, J. (dissenting). It is urged that the employer was storing only his own goods and was not engaged in the business of storage, and that the statute contemplates a warehousing business or storage business carried on for the storage of goods of others for hire. We think this is too narrow a construction of the law. If the employer has a large storage warehouse and was receiving heavy packages of merchandise which were to be moved from time to time by his employees, the risk to them is the same whether he is storing the goods for himself or for others. The statute is a beneficial one, intended to throw upon the business the risks incident to and resulting from it, and the liability ought not to depend upon the question whether the goods in storage were the goods of the employer or the goods of others. In the same group is the operation of grain elevators. It is immaterial whose grain is being elevated, whether the elevator is used for the grain of the employer or of another. The nature of the hazard is the important thing.

Group 10 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) is "Longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place

of storage." This group gives color to the construction we have taken of group 29 of section 2. It is the handling of the cargoes, or parts of cargoes, the moving of heavy merchandise, that is deemed a hazardous business.

While the employer did not receive compensation for storage of his own goods, he was storing his goods for profit and was operating the warehouse part of his business in order that his profits might be enhanced. Whenever he received an order he had the goods in his storehouse with which to fill it. The operation of the storehouse was a necessary part of his business, and the storehouse was maintained by him for profit. Apparently the claimant's employment was in receiving, shipping and handling the produce in the warehouse for storage.

We, therefore, conclude that the question submitted to the court should be answered in the affirmative. HOWARD, J., concurred. Question certified answered in the negative. *Millem v. Hussey*, 169 App. Div. 742, Nov. 10, 1915.\*

(*Bargey v. Massaro Macaroni Co., Appellate Division.*)

KELLOGG, J.: The macaroni company was occupying a building which had been an old hotel. It purposed making upon the ground floor of the part of the building repaired a saloon, and to use the second and third floors in its general business. The work in changing the floors and roof was done by the intestate, under a contract by which he was to do the work and furnish the material for \$500. That contract was performed by him. A part of the time he had men working with him. As the work progressed, from time to time the company would have extra work done, for which he was paid by the hour. Before the contract work was completed, extra work was contemplated of putting a partition through the saloon part of the building, thus making the saloon smaller than first intended, and using the other part, which was partitioned off from the saloon, as a machinery room for the company. The studding for the partition between the saloon and the new machinery room had been put up as extra work while the contract work was being performed. A delay occurred, perhaps to permit the building to settle, and then the deceased was requested to come on and finish the partition. He was in the saloon part, nailing lath to the studding over the door, when the accident occurred. He was a general carpenter, doing such work as he was called upon to do for different people, usually by the hour, but sometimes took jobs. He was not in the general employ of the company, but was the man it usually employed to do little odd jobs about its building. He never did any work in the macaroni business; his only work for the defendant was doing work upon or about its buildings. I do not think he was an employee in a business declared hazardous by the Workmen's Compensation Law. Clearly he was not engaged in the macaroni business, but his sole business was as a carpenter. The company was not carrying on the carpenter business, or doing any carpenter work for a profit; it was making repairs and improvements upon its real estate and hired a general workman for that purpose. If a man in a business not hazardous employs a carpenter to do some work upon his property, like fixing a window or a door, I do not think the person performing the work is an employee engaged in the hazardous business of

\* Since the handing down of this decision, the Legislature has amended Workmen's Compensation Law, § 2, group 29, to read: " \* \* \* warehousing; storage of all kinds and storage for hire \* \* \* ." L. 1916, ch. 622.

structural carpentry. A judge who hires an ordinary carpenter to come to his office or house and put in a new window is not engaged in a hazardous business under the law. "Employment" is defined by subdivision 5 of section 3 of the law to include "employment only in a trade, business or occupation carried on by the employer for pecuniary gain." If the employer in the hazardous employment uses his regular employees in doing something which may not be a hazardous employment in itself, but the work is a part of his general employment and incident to it, we may well say that the employee received the injury while engaged in a hazardous employment. But where a man engages a carpenter by the hour to do some work upon his premises in the way of improvements, I cannot feel that he is engaged in the hazardous employment of structural carpentry or repair of buildings as contemplated by group 42 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). I, therefore, favor a reversal.

All concurred, except WOODWARD, J., dissenting, in opinion.

WOODWARD, J. (dissenting). The record of the proceedings before the State Workmen's Compensation Commission discloses no reason for disturbing the determination reached and award made in favor of Louisa Bargey, wife of the deceased workman, Lyman D. Bargey. A careful examination of that record shows clearly the correctness of the results reached by the Commission and demonstrates that the claimant is fairly entitled to the protection of the Workmen's Compensation Law.

On December 2, 1914, the deceased was at work as a carpenter for the Massaro Macaroni Company in his home town of Fulton. He was doing the work personally; he had then no assistants and had not had any on the work on which he was then engaged. There had been no contract, written or oral, between himself and his employer regarding the work he was then doing or payment therefor, except that he was told what the employer wanted him to do and he was doing it. He was to be paid by the hour for his time with reimbursement for any materials furnished by him. He had done other work, at various times, for this and other employers and, apparently with the one exception hereafter noted, had been similarly paid. When the president of the employer wanted a piece of carpenter work done he commonly sent for Bargey, and Bargey came and did it. On one previous occasion there had been a rather meager memorandum of an agreement with Bargey covering a specified work of an unusual quantity, cost and duration, at a "lump sum" compensation. In doing the work under that agreement Bargey had the services of a helper, some weeks or months before. He paid this helper for his time, and when that work was finished, the helper went to work elsewhere. Before he began the work in the course of which he met his death, he had completed all the work to which the written contract related, and had rendered to his employer his final bill for that and other work previously performed. He had no office or store, no billheads or contract forms, no regular employees, no payroll, no insurance as an employer. His work was invariably of the artisan's grade; for at least fourteen years he had worked continuously as a carpenter, usually alone on individual jobs, and usually by the day or hour. It does not appear that he ever exercised anything approximating superintendence or independent direction of work he was hired to do.



On the forenoon of December 2, 1914, the floors of the employer's building came crashing down upon Bargey's head, killing him instantly. On December 4, 1914, the employer made its report of the injury to the Compensation Commission and stated therein as follows:

"Was employee injured in course of employment? Yes. \* \* \* Occupation when injured? Carpentry work. Was injured employee doing his regular work? Yes. \* \* \* Piece or time worker? Time worker and contractor."

Questioned by counsel for the insurance carrier, before the Commission, the president of the employer testified: "Q. What was his [Bargey's] business? A. Carpenter. Q. Anything else than a carpenter? A. He was a contractor."

Undenially, at the time he met his death, Bargey was working alone, as a time-worker by the hour, doing artisan's work, without contract other than that of employment.

After comprehensive taking of testimony the Commission found, as a matter of fact, that the decedent was a carpenter and an "employee" at the time he met his death.

The assertion of the insurance carrier that Bargey was not an "employee" within the meaning of the statute cannot be sustained in the light of the rulings of this court in *Matter of Rheinwald v. Builders' Brick & Supply Co.* (168 App. Div. 425); *Matter of Moore v. Lehigh Valley R. E. Co.* (169 id. 177); *Matter of Powley v. Vivian & Co., Inc.* (Id. 170), and similar cases.

Precedent and common sense alike place, within the purview of the Workmen's Compensation Law, this claimant's husband and the work he was doing when death ended his service as a wage earner. We find no reasons for alteration of the views maturely expressed by this court in the *Powley*, *Moore* and *Rheinwald* cases.

The Commission's determination as to the claim at bar is abundantly sustained by the evidence, and the award should be affirmed. Award reversed and claim dismissed. *Bargey v. Massaro Macaroni Co.*, 170 App. Div. 103, Nov. 10, 1915.

(*Bargey v. Massaro Macaroni Co., Court of Appeals.*)

COLLIN, J.: The Massaro Macaroni Company, denominated the employer, was engaged in manufacturing macaroni. Its business was within group 33 of the hazardous employments enumerated by the Workmen's Compensation Law (L. 1914, ch. 41; Cons. L., ch. 67). The group is defined as follows: "Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries." The deceased, Lyman D. Bargey, was a carpenter and builder. He had contracted with the company that he would "raise the second and third story floor and roof of the portion at the southwest corner of the macaroni factory to a level with the floor and roof north of this section," and furnish the labor and material therefor, for a stated sum. During the performance of the contract, work additional to that contracted for developed, which Bargey did, as directed, and presented itemized bills for the materials and labor therefor to the company. An item of it was placing a partition. During the performance of the contract, the partition had been constructed in part and thus left while the new floors of

concrete were drying. Bargey came back to finish it after the contract was completed and while working upon it was killed by the collapse of the building. The Appellate Division reversed the award of the state industrial commission upon the ground, as appears from the prevailing opinion, that Bargey was not an employee engaged in an hazardous employment, within the Workmen's Compensation Law, and dismissed the claim. We are of the opinion that such conclusion was correct.

The law provides: "Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments," which are enumerated in groups. (Section 2.) Obviously, two factors are essential to empower the commission to award compensation, namely, (a) an employee injured (b) while engaged in an hazardous employment named in the section. The law contains these definitions: "'Employment' includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain." (Section 3, subd. 5.) "'Employer,' except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments; but does not include the state or a municipal corporation or other political subdivision thereof." (Section 3, subd. 3.) "'Employee' means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants." (Section 3, subd. 4.) The law further provides: "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment \* \* \*." (Section 10.)

The determination of the question here, through the application of these provisions, is not difficult. The company was an employer, because it employed workmen in an hazardous employment, to wit, preparing macaroni, a food stuff. Bargey, the deceased, was not an employee, because he was not engaged in the preparation of macaroni. The placing of the partition was not an adjunct of or within a department of the employment of preparing macaroni. It was a specific act for which Bargey was specially employed, which had no relation to the hazardous employment except that it made more useful, within the contemplation of the employer, the building in which the employment was carried on. He was not engaged in the preparation of macaroni, even as in partitioning off a part of the residence of a physician as a professional office he would not be engaged in the occupation of practicing medicine. He was not, within the intendment of the law, an employee of the company.

The appellant invokes also the part of the language creating group 42 as follows: "construction, repair and demolition of buildings." It is answered by the fact that the company did not carry on the occupation of constructing, repairing and demolishing buildings for pecuniary gain. This conclusion is obvious beyond the need of discussion.

The findings and determination of the appellant were without support in the evidence and the order should be affirmed, with costs against the state industrial commission.

WILLARD BARTLETT, Ch. J., HISCOCK, CUDDEBACK, HOGAN and POUND, JJ., concur; SEABURY, J., dissents on dissenting opinion of WOODWARD, J., below.

Order affirmed. *Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410, June 16, 1916.

9. *Injured employee working solely in employment not covered by Workmen's Compensation Law, § 2, though for employer so covered.*—The Rheinwald, Mihm and Bargey decisions may profitably be compared with the decision in *Aylesworth v. Phoenix Cheese Co.* The Appellate Division handed down the Aylesworth decision on the same day with the Mihm and Bargey decisions. Aylesworth's fingers were frozen. He was harvesting ice for a cheese factory. He was not, and had not been, one of its cheese-making employees. The court held that his case lay entirely without the hazardous employment of making cheese and solely within the non-hazardous employment of harvesting ice.\* The opinion was as follows:

WOODWARD, J.: It appears from the claim filed by Earle Aylesworth that he was engaged in floating ice on the Nandella rixer on the 26th day of December, 1914, in the forenoon of that day, and that while so engaged two of the fingers of his right hand were frozen, so that amputation became necessary. The general work undertaken by the Phoenix Cheese Company at the time of the freezing was harvesting ice, and the claimant was employed solely for this purpose. He was asked, "How long have you worked for present employer?" and the answer was, "Just filling their ice house." Asked if he was doing his regular work when injured, the answer was "Yes." It thus appears that the Phoenix Cheese Company employed the claimant for the single purpose of harvesting ice, and his special duty appears to have been the floating of the cakes of ice after they had been cut. In performing his work upon a day in December, when the mercury stood at thirty degrees below zero, he froze some of his fingers, and the Compensation Commission has awarded him \$159.50. The Phoenix Cheese Company and the Zurich General Accident and Liability Insurance Company, the insurance carrier, appeal from the order.

Obviously this award cannot be sustained. The only group of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) suggested as covering this case is group 33, which names as one of the hazardous employments the "Canning or preparation of fruit, vegetables, fish or foods stuffs; pickle factories and sugar refineries." The theory

\* Ice harvesting, as well as the storage and distribution of ice, has been brought under the coverage of the Workmen's Compensation Law since the Aylesworth accident occurred, by amendment of § 2, group 25. Formerly, the manufacture of "artificial ice" only was covered.

appears to be that the Phoenix Cheese Company (which we will assume is engaged in the preparation of food stuffs) was the employer of the claimant, and that the harvesting of ice was incident to its business of preparing food stuffs. What might be the law if the claimant was regularly employed in making cheese and had been sent out into a freezing cold to assist in gathering a crop of ice, is not now before us; the record shows that he was employed for this special purpose and was engaged in his regular occupation when the injury was sustained, and there is no suggestion in the statute that a common laborer engaged in harvesting ice is engaged in a hazardous occupation. "Hazardous employment," as defined by subdivision 1 of section 3 of the act in question, "means a work or occupation described in section two of this chapter," and section 2 provides that the "Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments." Among such employments there is no mention of harvesting ice, and the record conclusively shows that the claimant was not employed in "Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries." He was at work at his regular employment of harvesting ice, and under well-established rules of construction the language of the Workmen's Compensation Law found in group 33 of section 2 cannot be stretched to cover this case. *First*, the express mention of the matters embraced in the several groups necessarily excludes those not mentioned (*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57); and, *second*, the rule of *ejusdem generis* would prevent any general language to be extended beyond the special language used. (*People ex rel. Kinney v. White*, 64 App. Div. 390, 392; *Lantry v. Mede*, 127 id. 557, 560.)

The order appealed from should be reversed and compensation denied. All concurred. Award reversed and claim dismissed. *Aylesworth v. Phoenix Cheese Co.*, 170 App. Div. 34, Nov. 10, 1915.

The Aylesworth decision turned upon the definition of "hazardous employment" (§ 3, subd. 1); the Rheinwald decision upon the definition of an "employee" (§ 3, subd. 4); and the Mihm and Bargey decisions upon the definition of "employment" (§ 3, subd. 5). In the Aylesworth case the work of the employee, harvesting ice, was not hazardous, while the business of the employer, making cheese, was hazardous. In the Mihm case the work of the employee, warehousing, was hazardous, while the business of the employer, buying and selling produce, was not hazardous. In the Bargey case both the work of the employee, carpentry, and the business of the employer, making macaroni, were hazardous. The employee in the Mihm case was a regular employee. The employees in the Aylesworth and Bargey cases were casual or temporary employees. The court, in the Mihm case, would seem to have required an independent footing for

the hazardous employment in order to an award of compensation, a disassociation from, or lack of subordination to, any other employment; that is, the warehousing should not have been connected with, or incidental to the wholesale produce business. The court, in the Bargey case, would seem to have required an identity of occupation and business on the part of the employer and employee in order to an award of compensation; that is, both employer and employee should have been makers of macaroni or both should have been structural carpenters.

10. *The injured employee working in an employment not covered by Workmen's Compensation Law, § 2, though for an employer who is also engaged in another and an entirely distinct employment that is so covered.*— A purchasing agent buying fruit in West Virginia was hurt by the overturning of an automobile. The State Industrial Commission awarded him compensation because his employer was engaged in the fruit storage business in New York. It found that he was also assistant to the manager and resided in New York at the place of his employer's storage plant. The Appellate Division reversed the award upon the ground that "the employer was engaged in two entirely distinct kinds of business, one of which was not within the protection of the statute, and that the claimant was injured in performance of his duties which at the time of the injury solely had reference to that kind of business not thus protected."

The decision in full is as follows:

COCHRANE, J.: The Commission has found that the employer, the Ballston Refrigerating Storage Company, was "engaged in the business of handling and storing fruits and produce at Ballston Spa, New York," and that the claimant "was employed as a purchasing and sales agent and assistant to the manager by the Ballston Refrigerating Storage Company." These findings are in accordance with the facts. The employer conducted a storage business at Ballston Spa, N. Y., and to that extent was engaged in a hazardous employment as described in section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), which includes in group 29 of that section the business of "storage." The employer was likewise engaged in the business of buying and selling fruit, and it may be assumed that some or all of the fruit thus purchased was subsequently stored in its storehouse at Ballston Spa.

When the claimant was injured he was engaged in buying fruit in West Virginia. In his claim for compensation he stated his occupation when injured

as "buyer of fruits and salesman." He was going from place to place inspecting and buying fruit in an automobile when it overturned and he thus received the injury in question.

I do not think the work in which the claimant was engaged when he received his injury has any logical or appropriate connection with the storage business. That business implies merely the housing and care of property within a storehouse or other appropriate place of deposit. There is no implication that the goods stored belong to the person engaged in the storage business. In fact, ownership of the goods is entirely irrelevant. And whatever dangers and hazards may be incident to the storage business certainly have no connection with traveling through the country as a purchasing or sales agent. The purchasing of goods and acquiring ownership thereto is not an incident to the business of conducting a storage house. The statute should be given a liberal interpretation, but liberality should not be stretched into extravagance, and it seems to me that it would be highly unreasonable to hold that this claimant was injured in a hazardous employment as described and defined by the statute. It certainly was not the legislative intent in using the word "storage" and making it a hazardous employment to include therein the duties of a purchasing agent which differ in no respect merely because the objects of his purchase may find their way into a storage house.

I assume that the claimant in the course of his employment had duties to perform in connection with the ordinary storage business, and that he would be entitled to compensation for an injury received in the performance of such duties. But the difficulty is that the employer was engaged in two entirely distinct kinds of business, one of which was not within the protection of the statute, and that the claimant was injured in performance of his duties which at the time of the injury solely had reference to that kind of business not thus protected. This is not a case where the duties of the employee in connection with two different kinds of business are so blended and intermingled that it is impossible to say that the particular act which he was doing when injured related to one kind of employment rather than to the other. Here it appears beyond peradventure that the employee was doing nothing at the time of his injury which had any pertinent or legitimate connection with the storage business, and this is so notwithstanding the presumption which the statute (§ 21) establishes in favor of an award. The evidence here is conclusive to the contrary.

The award should be reversed and the matter remitted to the Commission for further action. All concurred.

Award reversed and matter remitted to the Commission for further action. *Sickles v. Ballston R. S. Co.*, 171 App. Div. 108, Jan. 5, 1916.\*

In the following three opinions of later date the Appellate Division has reversed awards of the Commission upon grounds similar to those of the Sickles and Aylesworth reversals. In *Mandel v. Steinhardt & Bro.*, the injured employee, like Sickles, was an outside salesman away from his employer's plant; in *Lyon v. Windsor & Davis*, the injured employee was an inside salesman

\* Compare this decision with the decisions in the "incidental employment" cases below, pp. 182-221.

in a showroom directly connected with his employer's factory, into which his duties often took him, and was injured by a fall on the factory floor; in *Brown v. Richmond Light & R. R. Co.*, the injured employee was a process server for a street railway and was injured while riding as a passenger on one of its cars.

In *Mandel v. Steinhardt & Bro.*, the court rules that the employee as well as the employer must be engaged in the hazardous employment. The brief opinion is as follows:

HOWARD, J.: The claimant was a traveling salesman. His employer was engaged in the manufacture of leather and other fabric novelties in New York city. The claimant occasionally visited the factory to procure samples. He was injured while riding in a public bus from White Plains to Port Chester, and was at the time of the accident engaged in his regular occupation of going from place to place for the purpose of selling goods.

Under group 32 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) the employer was engaged in a hazardous employment, but the claimant was not so engaged. The hazards incident to manufacturing leather goods in no manner menaced this claimant riding along on the highway in a bus with other passengers. In fact, the vicissitudes of the claimant as he journeyed from town to town were not in the remotest degree affected by the character of the business carried on by his employer; his perils were not increased, his safety not diminished. It is not sufficient under the statute for the employer to be engaged in a hazardous employment; the claimant must have been so engaged.

We have just recently passed upon this question in a case quite similar to this. (*Matter of Sickles v. Ballston Refrigerating Storage Co.*, 171 App. Div. 108.) In view of the opinion written there it is unnecessary to make further comment here.

The award should be reversed and the matter remitted to the Commission for further consideration. All concurred. Award reversed and the matter remitted to the Commission for further consideration. *Mandel v. Steinhardt & Bro.*, 173 App. Div. 515, June 30, 1916.

In *Lyon v. Windsor & Davis*, the court quotes a governing principle from its opinion in *Gleisner v. Gross & Herbener*. "A salesman," it says, "does not become an artisan, or a participant in any process of manufacture, merely by crossing the threshold of a factory." The majority opinion and the dissenting opinion of Presiding Justice Kellogg are as follows:

WOODWARD, J.: The award made by the State Industrial Commission must be set aside as unsustained by the findings or the evidence and as based upon an erroneous conception of the Workmen's Compensation Law.

The claimant was a salesman. His duties were performed within the place of business of his employers, the firm of Windsor & Davis, copartners in the

business of manufacturing dresses and women's gowns. The claimant's principal, if not exclusive, duties were those of salesmanship; he concededly had nothing to do, by way of either participation or supervision, with the actual manufacture of anything; the record contains nothing concretely indicating any duties or acts on the part of the claimant, beyond those ordinarily and reasonably incident to the performance of his regular work as salesman. He did no traveling for the employers; he ordinarily sold goods to customers in the showroom which was connected directly with the factory and was in the front part of the same building and on the same floor. The claimant's duties took him frequently into the rooms where the manufacturing was actually carried on.

The only testimony adduced before the Workmen's Compensation Bureau of the State Industrial Commission, as explanatory of the circumstances of the accident which befell the claimant, was the following: "This accident happened during my duties which called me to the factory. \* \* \* Q. You were attending to a customer when the accident happened? A. Yes. Q. The customer was in the show room, and you were going into the factory? A. Yes. \* \* \* Q. What have you, a broken kneecap? A. Yes."

The employee's "first notice of injury" stated as the "cause of accident" that the claimant "fell on floor;" the employee's "claim for compensation" stated that the claimant "fell on stone floor while passing through factory;" the employers' "first report of injury" stated that the claimant "was walking to a rack of dresses to get one to show to a customer, when he fell;" but the only testimony adduced as to the liability or circumstances of the accident, the nature or extent of the injuries, or the duration or extent of the disability was that above quoted. Yet from this testimony the Commission very solemnly found as a "conclusion of fact" that "While Robert Lyon \* \* \* was passing through the factory, he slipped on a stone floor and fell, receiving a fracture of the right patella, by reason of which injury he was disabled from working from the date of the accident to August 6, 1915, and on that date was still disabled."

Before considering the merits of the question essentially here at issue, viz., whether the claimant salesman was engaged in the "manufacture of \* \* \* women's clothing, white wear \* \* \* or robes," within the meaning of group 38 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), expression should be made of regret that the evidence taken in this case is so scanty and meagre, and that the findings and record alike are so barren of those details essential to an award under forms of law and in conformance to reasonable procedure. Altogether outside of the merits of the essential question at issue as above outlined, this award would necessarily be reversed and the proceeding remanded to the Commission for hearing, for the reason that by no possibility does the evidence warrant or sustain the findings of fact, nor do the so-called findings or conclusion of fact sustain the so-called rulings of law or the award predicated thereon. Money may not be taken, directly or indirectly, even from the purchasers of women's apparel and the community at large (*Matter of Rheinwald v. Builders' Brick & Supply Co.*, 168 App. Div. 425) upon such a paucity of findings and proofs.

I prefer, however, to discuss the vital question on its merits, and here I find that by the claimant's own statements of fact his injury did not occur



under circumstances entitling him to the benefit of this salutary statute. The Legislature has not yet defined salesmanship, outdoor or indoor, as by nature a "hazardous" employment; the Legislature has not yet placed the exhibition and selling of feminine apparel within the category of occupations enumerated in section 2. The situation at bar, therefore, falls fairly within the rule laid down by this court in *Matter of Gleisner v. Gross & Herbenor* (170 App. Div. 37), where this court said:

"The actuality, rather than the appellation, is the sound basis for the Commission's action in determining whether an employee met with mishap in the course of an enumerated employment. If, within the scope of his duties, he was injured while actually and unmistakably doing, at the moment, work of a kind specifically defined in the statute as 'hazardous,' his right is clear; under other circumstances his right must depend on proof of facts regarding which the present findings and the present record are alike inadequate basis for affirming an award.

"The applicability of the enumerations or definitions of 'employments' deemed entitled to the protection of the statute is of course not to be determined narrowly and constrainedly, but rather in the reasonable and common sense manner essential to the vitality of the operation of the statute. If an employee is hired for work falling exclusively or predominantly within one or more of the enumerated occupations, his right to compensation for injury in the course of his employment cannot fairly be made to hinge on a finding that he was, at the moment of injury, engaged in an act clearly constituting the direct doing of work named in the act. The painter's right to compensation for injury sustained at his daily trade does not depend on a showing that he was at the moment applying a brush, mixing paints, or mounting a scaffold. If an employee's duties are exclusively or predominantly within an enumerated employment or employments, and he is injured while doing work fairly within the scope of the ordinary and accustomed fulfillment of such duties, he has a rightful claim, even though the particular act he was doing when mishap befell him would not, of and by itself, ordinarily be described by the use of phraseology contained in the statute or as the doing of work enumerated in the statute. To hold otherwise would defeat the fair purpose of the law, and make its operation hinge and its benefits depend on harsh, arbitrary and unworkable distinctions which would inevitably paralyze its practical workings. Where, however, as apparently here, the employee's ordinary duties and accustomed scope of activities do not come exclusively or predominantly within the category of enumerated employments, and only casually and incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named in the statute. If the employer shows that the employee was not so engaged when he met with injury, he is not entitled to reimbursement under the statute, even though he at times did work embraced within the statute."

The claimant's contention here is that a "salesman" becomes engaged in the "hazardous employment" of *manufacturing* dresses if, in the course of his work of *selling* dresses, he went into the *place* where dresses were being manufactured, even though the purpose of going there was not to participate in manufacture or perform any act incidental to any process of manufacture, but only to obtain a completed garment for exhibition to a customer in the adjoining showroom. To state the contention is to expose its unsoundness, in law and in common sense. The ordinary activities of salesmanship are not embraced with the "manufacture" of the article being sold. The claimant had nothing to do with manufacture, in the general round of his daily tasks; he was injured while doing what he ordinarily and often did; by no stretch of fact or fancy can he be said to have been, at the moment of injury or at any other moment, engaged in the "manufacture" of the article he sought for purposes of display and sale. A salesman does not become an artisan or a participant in any process of manufacture merely by crossing the threshold of a factory.

The contention of my learned colleague that this award should be sustained by this court seems to be based upon two fundamental misapprehensions, which derive an especial significance from the manner in which employers in this State most commonly "provide" for the payment of the statutory compensation. The first is that "evidence" to sustain findings and an award can be

said to exist where, as here, despite all the detailed facts which I have summarized, the testimony contains a few loose phrases, comments and conclusions, not inconsistent with the facts testified to, and also not inconsistent with a state of facts which would sustain the award. For example, the claimant salesman at bar described himself in his testimony as "indoor salesman and general assistant, and anything that comes up in the business during the day \* \* \* I do whatever comes along in the showroom or factory. Things come up that bring me all over the floor, and this accident happened during my duties which called me to the factory." The employer entered no specific denial of the accuracy of these observations, although the whole record, by its concrete facts disclosed, operates to refute such observations, and is far from sustaining them. As I have observed, there is no detail of evidence showing that in the fancied capacity of "general assistant" the claimant ever did anything by way of supervision or participation, which actually had aught to do with the manufacture. "Things" did "come up" which took him to the factory as well as showroom portion of the "floor," but it does not appear that any of these acts or duties ever concerned anything except the display and selling of goods. He went into the factory, truly enough, as in this instance, but to procure completed goods for exhibition, not to help or supervise the making. A salesman who slips and falls on a floor, when in the act of taking completed dresses from a rack for the purpose of carrying them back to a customer waiting in the showroom, can hardly be said to sustain an injury arising "from" and "out of" and "in the course of" employment in the "manufacture of \* \* \* women's clothing." Details of actual tasks and duties must be developed before the Commission, rather than scant comments and conclusions such as those claimed to create a controversy of fact in this instance. This becomes especially important under the practical current workings of the Workmen's Compensation Law. After the employer has paid a substantial premium to an indemnity company as "insurance carrier," the employer and his employees often find little or no reason for the elucidation of facts which might prevent a fellow-employee, usually one still in the service, from receiving a substantial stipend from the indemnity company during the period of disability. There is a recognizable human temptation and tendency to "stretch" the facts, indulge in generalities and let fall helpful observations, where the outcome will be indemnity to an injured friend and coworker without apparent additional cost to the employer. This human factor is one which the Commission and courts must watch, in the practical working of the law. Neither Commission nor courts have a right to let the zeal of the claimant or his coworkers and the indifference of the insured employer give evidentiary force, much less decisiveness in themselves, to mere observations and conclusions which would have no place at all in the record of proceedings before a tribunal governed by the historic concepts and rules of orderly proof.

In the second place the contention of my learned brother is in the last analysis based fundamentally on a conception of the scope of a workmen's compensation plan which should be addressed to the Legislature rather than sought to be accomplished by the courts. Basically his view would make the employer's *business*, not the employee's *occupation or actual work*, the test of the employee's right to the protection of the statute. The *employer* is in the business of the "manufacture of \* \* \* women's clothing. That is one

of the enumerated employments. Therefore, the salesman who sells the goods manufactured, the truckman who delivers them, the bookkeeper who kept the accounts, the stenographer who writes the letters, the telephone girl who operates the switchboard, the boy who runs errands and sweeps the office floor are all engaged in the "manufacture of \* \* \* women's clothing" and are entitled to statutory compensation if injured while working for that employer, even though other salesmen, bookkeepers, stenographers, telephone operators and office boys are left to the inadequate remedies of actions for damages for negligence. The question whether the salesman, stenographer or office boy met with injury while on the factory floor or in the office proper, perhaps in a detached or distant building, or even outside any premises owned or used by the employer, is by the statute expressly made immaterial. The test is whether the injury came "in the course of" the employment and arose "out of" work being done by the employee, no matter where. A salesman or stenographer employed by a concern which manufactures "women's clothing" is neither more nor less engaged in the "employment" of such "manufacture" when he or she is doing work of salesmanship or stenography in the factory rooms than when doing the same work in the office proper, wherever that office may be. The Legislature has not yet, in my judgment, made the *employer's* business the test and given *all* his employees the protection of the statute, if only the business carried on by the employer is one of those enumerated in the statute. The employee's right to compensation arises when *he* does work enumerated in the statute. His own occupation and employment, the thing which he does for his employer, confers the right, not the nature of the employer's business. In other words, workmen's compensation has not yet been made by the statute a matter of *employer* insurance or *business* insurance. The law does not yet say that all persons employed, in whatever capacity, by a particular *employer* or *class of employers* shall come within the statute. The law does not yet say that every person who is employed, in any capacity, in the course of a particular *business*, shall come within the statute. The law does say that "compensation \* \* \* shall be payable for injuries sustained \* \* \* by *employees* engaged in the following *hazardous employments*." The work of salesman of women's apparel has not been determined to be any more "hazardous" than any other salesmanship; only the "manufacture" has been declared "hazardous." The risk and hazard that a salesman may slip and fall on a stone floor are no greater if he sells women's clothing than if he sells shoelaces. The statute does not yet say, on the other hand, that an employee who is injured while authorizedly doing for the employer work which the Legislature has defined as hazardous, is barred from compensation unless that work identically represents the business carried on by the employer. As pointed out in *Matter of Rheinwald v. Builders' Brick & Supply Co.* (168 App. Div. 425), the Workmen's Compensation Law is legal enactment of a social conviction that the risks incurred by those who do the manual work of inherently dangerous and "hazardous" employments should be made a charge upon the cost of the product, without regard of proof of legal fault. It does not represent a belief that because some part of the employer's business requires some of the employees to do work defined as "hazardous," thereby *all* the employees of that business become entitled to the statutory indemnity for disabling accident.

Here again the presence of the indemnity companies as a predominant factor in the provision of insurance under the statute has led to confusion of

interests and has brought in a practice broader than the statute. Protection of the employer against claims by *any* worker has become a common undertaking of the insurance carrier. The employer "insures" himself against any claims by his employees, no matter what their principal or casual duties. Yet this fact should not lead to judicial legislation broadening the statutory purpose, or produce departure from the wise and workable standards unanimously declared by this court in the *Gleisner* case, above quoted. The fact that this claimant's employer is engaged in the business of manufacturing and selling women's clothing, and that the claimant worked in the selling, does not warrant the conclusion that this salesman was "engaged" in the "hazardous employment" of the "manufacture of \* \* \* women's clothing." That showroom and factory room were on the same floor does not change the situation. That the salesman's duties took him into the factory and that he slipped and fell while there does not alter the legal principle or make salesmanship a part of "hazardous" manufacture. The risk assumed by the worker, by the nature of his work, not the product sold or the service rendered by the employer, determines the applicability of the statute. If another rule it to be imposed, that is a task for the Legislature, not this court, as the learned presiding justice proposes.\*

Nothing decided by this court in *Matter of Benton v. Fraser* (172 App. Div. 913); *Matter of Nicholson v. Klipstein & Co.*, (171 id. 970); *Matter of Larsen v. Paine Drug Co.* (169 id. 838); *Matter of Berliner v. Ritchie & Cornell* (172 id. 913), or *Matter of Burton v. Whelen & Sons, Inc.* (Id. 913) is at variance with the views herein expressed. *Matter of Aylesworth v. Phoenix Cheese Co.* (170 App. Div. 34); *Matter of Sickles v. Ballston Refrigerating Storage Co.* (171 id. 108); *Matter of de la Gardelle v. Hampton Co.* (167 id. 617), and *Matter of Gleisner v. Gross & Herbener* (*supra*) are in full accord.†

The award should be set aside and the matter remitted to the Commission for further action.

All concurred, except KELLOGG, P. J., dissenting in memorandum.

KELLOGG, P. J. (dissenting): The claimant swore that he was an "indoor salesman and general assistant, and anything that comes up in the business during the day. I am in the whole day. I am absolutely not a traveling man. I do whatever comes along in the showroom or factory. Things come up that bring me all over the floor, and this accident happened during my duties which called me to the factory." The employer did not controvert this evidence.

I think it is a mistake to treat the claimant as a mere salesman. The showroom and factory were in the same building, and he was employed generally in either room as salesman or general assistant, as occasion required. The findings are binding upon us. They rest comfortably upon the evidence, and if we were at liberty to review them we could not say that they are unsupported. I favor an affirmance. Award reversed and matter remitted to the Commission for further action. *Lyon v. Windsor & Davis*, 173 App. Div. 377, May 18, 1916.

\* Since this opinion was handed down, the legislature has amended Workmen's Compensation Law, § 3, subd. 4, to read: "Employee" means a person engaged in one of the occupations enumerated in section two or who is [engaged in or hazardous employment] in the service of an employer whose principal business is that of carrying on or conducting [the same] a hazardous employment \* \* \*."

The italics indicate newly inserted phrases; the brackets, eliminated phrases.

† These and all other cited New York Workmen's Compensation decisions are contained in this bulletin and may be found by means of its prefaced table of cases.

In *Brown v. Richmond Light & R. R. Co.*, a passenger trod upon Brown's toes. The injury resulted in gangrenous diabetes and caused Brown's death. The Commission awarded death benefits to his parents, declaring that he was about his employer's business which was concededly covered by the Workmen's Compensation Law and, since he was riding upon his employer's car, was upon his employer's plant: S. D. R., vol. 7, pp. 371 and 420. The Appellate Division reversed the award and dismissed the claim, declaring that Brown was riding on the car not as an employee but as a passenger and that to have been entitled to compensation he must have been engaged in the hazardous work of operating the car or must have been in some way subject to the hazards arising out of the nature of such work. The court said:

**KELLOGG, P. J.:** The employer is operating street railways and a public lighting system on Staten Island. George R. Brown, the claimant's son, was employer by it "as a process server, claim adjuster and investigator \* \* \*". His duties were entirely in reference to claims for damages against said Company, and he was connected with the claim department of the Company." On April 9, 1915, he had been to New Rochelle to serve a subpoena and was returning to the office, riding upon one of the defendant's cars. "A fellow passenger stepped upon his foot accidentally, severely bruising the foot, requiring the later amputation of two toes of the left foot, which resulted in gangrenous diabetes, causing his death on May 4, 1915."

By section 2 of the Workmen's Compensation Law, compensation is payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:

"Group 1. The operation, including construction and repair, of railways operated by steam, electric or other motive power, street railways, and incline railways, but not their construction when constructed by any person other than the company which owns or operates the railway, including work of express, sleeping, parlor and dining car employees on railway trains."  
"Group 12. Construction, installation or operation of electric light and electric power lines, dynamos, or appliances, and power transmission lines."

In determining whether the intestate received his injury while engaged in a work or occupation declared a hazardous employment we may consider certain definitions in section 3 of the law. By subdivision 1 "hazardous employment" means a work or occupation described in section 2. By subdivision 3 an "employer" is a person employing workmen in hazardous employments. By subdivision 4 an "employee" is a person engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises, or at the plant, or in the course of his employment away from the plant of his employer.

The decedent was not in any manner employed upon, about, or in connection with the tracks or cars of the railroad, and had nothing to do at, about or in connection with the electric light and power lines, dynamos or appliances of the company. His employment was in the claim department of

the company, which had nothing to do with the cars, the tracks or the electric lines or appliances. His duties, and the hazards attending them, were in all respects the ordinary duties of an investigator, a process server or claim adjuster, found in many of the large law offices. The fact that the decedent was employed by this corporation rather than a corporation carrying on any other extensive business employing a like service, does not make his work more hazardous. The fact that he was riding upon the car of the defendant rather than upon the car of another company, did not add to the hazards of the employment. In performing his duties it was necessary for him at times to go from one place to another. In doing so he might walk, ride upon a bicycle, a public bus, the car of another company, an automobile or other vehicle. At the time he was injured he was riding upon the car of his employer. If he had been riding upon the car of another company, or in a bus, and had received a similar injury, it would be a very strict rule which would hold that he was not within the law but would have been if he had been riding upon defendant's car. In a sense the uptown ticket agent of a railroad company, at an office a mile or so from the railroad track, whose only duty is to sell tickets over the counter, is engaged in operating a railroad, for the sale of tickets is a necessary incident to carrying passengers, but if such an employee fell while passing from one room to another in his office, it could not fairly be said that his injury arose out of the hazardous business of operating a railroad. He was not engaged in that work or occupation, but was a mere clerk, selling tickets at a distance from the railroad, and having no physical connection with the railroad or its operation. If the decedent was operating a railroad, it is difficult to see why the stenographer in the office of the law department was not also operating a railroad. The statute is intended to protect employees engaged in hazardous works and occupations, and has defined the employments which the Legislature deems hazardous. To be within the legislative intent, the work or occupation must subject the employee to the hazards contemplated by this law. The decedent was riding upon the car, not as an employee in the performance of a duty relating to the car, its operation or its passengers, but was a passenger for his own personal convenience. He was subject to the same hazards as any other passenger in the car, and the hazard came, not because he was operating a railroad, but because he was riding in a car, and the hazards, so far as the accident is concerned, were no greater upon the car than they would have been upon a bus or at any public place where people assemble. He was not necessary to or an incident to the operation of the car, and had no duty upon the car. The conductor, the engineer, the trainmen, possibly the stenographer, librarian and barber employed by a company upon a limited car, may be considered as engaged in its operation, as according to the rules of the company their presence and the performance of their respective duties are necessary for the operation of the car. But the decedent had no such relation to this car and was not in any way connected with its operation. The mere fact that an employee is in the service of a railroad company does not bring him within the act: he must be engaged in the hazardous work or in some way be subject to the hazards arising from the nature of the work.

In *Matter of Sickles v. Ballston Refrigerating S. Co.* (171 App. Div. 108), the claimant was in the employ of a cold storage company at Ballston Spa, N. Y., but at the time of the injury was buying fruit in West Virginia for

the company. It was held that he was not injured while engaged in the hazardous employment of "storage" under group 29.

In *Matter of Newman v. Newman* (169 App. Div. 745), the claimant was driving a delivery wagon for a butcher and meat dealer, but had stabled his horse, and later in the evening while carrying a piece of meat to a customer fell over a pail of glass upon the walk and was injured. It was held that he was not engaged in the hazardous employment of operating his vehicle when injured.

*Matter of Aylesworth v. Phœnia Cheese Co.* (170 App. Div. 34), and *Matter of Gleisner v. Gross & Herbener* (Id. 37), are along the same lines.

We conclude, therefore, that the claimant is not within the Workmen's Compensation Law. The award should, therefore, be reversed and the claim dismissed.

All concurred. Award reversed and claim dismissed. *Brown v. Richmond Light & R. R. Co.*, 173 App. Div. 432, June 30, 1916.

Sickles, Mandel, Lyon and Brown were not engaged in work or pursuits that subjected them to the hazards of their employers' hazardous employments, as enumerated in Workmen's Compensation Law, § 2. Three of them were salesmen. That circumstances may entitle a salesman to compensation is evidenced by the three decisions of the Appellate Division affirming commission awards in *Nicholson v. Klipstein & Co.*, *Benton v. Frazier*, and *Berliner v. Ritchie & Cornell*, noticed below, pp. 193, 197, under the headings, "The work is incidental" and "The employee is injured while ascending or descending stairs."

11. *The injured employee's contract of employment relates solely to work to be performed outside of the State.*—A decision handed down by the Appellate Division six days before the leading extra-territorial decision of the Court of Appeals in *Post v. Burger & Gohlke* reversed a commission award for an extra-territorial accident.\* The employee, a resident of New York, had been sent by his employer, a general contracting corporation whose offices were in New York, to Pennsylvania to work on a bridge that it was erecting. The Appellate Division reversed the award upon the ground that the employee was working intermittently upon such jobs for the company, that his contract of employment did not contemplate any work by him within the State of New York and that he had done no such work. The court pointed out that the payroll of the contracting company for work done in states other than New York did not serve as a

\* For the case of *Post v. Burger & Gohlke* see below, p. 236.

basis for its insurance under the Workmen's Compensation Law of New York and drew contrasts in that and another respect with the extra-territorial cases of the employees, Spratt, Valentine and Post, in which by a single opinion it had affirmed awards.\* The decision in full was as follows:

KELLOGG, P. J.: The question is whether the Workmen's Compensation Law covers this accident, which happened at the plant of the employer at Ford City, Penn. There is no dispute about the facts. The employer was a general contractor, with offices at Horseheads, N. Y., and performed contracts in the States of New York, Pennsylvania, Maine, Ohio, and wherever favorable opportunity presented itself. At times from 1902 to 1905 the decedent was in the employ of the company at various places. His next employment with it was in 1912 upon a job at Chemung, N. Y. When that job was completed he returned to his home at Callicoon, N. Y., for several months, and then was employed at a job at Old Town, Maine. While at Old Town he arranged with the company to go to Plymouth, Penn., late in the year 1913, but returned home for a time before going to Plymouth. From the Plymouth job he went to a job at Townsville, O. He then returned home for a couple of months. He was then employed by the company at Towanda, Penn., and when that job was nearly completed he agreed with a representative of the company at Towanda that he would go to Ford City upon the job to be undertaken by it there, and was to receive four dollars per day for his work. He desired, however, to return to Callicoon for a few days vacation. Not reporting at Ford City as agreed the company wrote him from Horseheads, sending him money for transportation, and asking him to report for duty at Ford City. He used up the money but did not go. The company again wrote him from Horseheads, urging him to go, as he was needed, and finally sent him a check payable to the railroad company for the fare. He went to Ford City, and was there killed while working upon the bridge the company was erecting at that place. The company insured its employees who were engaged in work in the State of New York, pursuant to the Workmen's Compensation Law. The payrolls on jobs out of the State were not used as a basis for such insurance. It carried a general insurance covering liability for all employees not engaged within the State.

In *Matter of Spratt v. Sweeney & Gray Co.* (168 App. Div. 403) we held that an employee who was in service at the plant of the company within the State, and on its pay rolls there, but whose employment required him to go over the State line to New Jersey for two days, did not lose the benefits of the act during the temporary absence from the State, the court considering that the absence from the State was a mere incident to the employment within the State, and that the premium of insurance was based upon the payrolls, which included the claimant, for the entire year. In *Matter of Valentine v. Smith, Angevine & Co., Inc.*, reported with the *Spratt* case, the chauffeur, who was in the regular employment about the plant at Port Chester, had driven his car to Greenwich, Conn., for a load of fats, where he received the injury. In *Matter of Post v. Burger & Gohlke*, reported with the *Spratt* case, Post was a sheet metal worker in the regular employment of the company

\* For this opinion see case of *Spratt v. Sweeney & Gray Co.*, below, p. 244.



at its plant in Brooklyn. He was sent in the course of his employment to perform some sheet metal work on an elevator in Jersey City. He had been working there one day when he received his injury.

In this case the decedent had not been employed by the appellant in the State since 1912. His employment had not been continuous, but had been from time to time for certain jobs which were being performed entirely without the State. The contract of employment did not contemplate any work by him within the State; no such work was done. The statute in question is intended to regulate the relations between the employer and employee in hazardous employments within the State, and to protect the employee within the State from the ordinary risks of the employment, and to charge those risks upon the ultimate consumer. The mere fact that an employee is engaged by a resident of the State to go out of the State for service and no service in the State is contemplated or done, cannot bring the employment within the act. Ordinarily a statute has no extra-territorial effect. But where the regular service of the employee is being performed in the State, and, as an incident to it, he goes over the State line temporarily, we have held that such temporary absence from the State does not relieve the employer from liability under this statute. The relations between the decedent and the company with reference to the work at Ford City depended upon the laws of the State of Pennsylvania, and the protection there given to the employer and the employee. The mere fact that the contract was made in the State, if it was made in the State, is not material here when we understand that the contract related solely to work to be performed outside of the State. It follows, therefore, that the employment of the decedent was outside of the State of New York and that he was not an employee or engaged in an employment within the State at the time of his death.

The findings are in the most general terms, and in arriving at the conclusion reached we are not hampered by the rule that the decision of the Commission shall be final as to all questions of fact, nor by the presumption that the claim comes within the terms of the statute. The employer and the insurance carrier are entitled to a hearing. The hearing is of a summary character, and the Commission is not bound by the ordinary rules of evidence and practice. Nevertheless, its determination as to the facts is a *quasi* judicial determination, and must rest upon the facts presented to it, the undisputed facts of the case and the reasonable inferences which may be drawn from them. The Commission cannot act arbitrarily on the information it receives or in direct violation of the conceded facts. Its duty, therefore, is to base its determination upon the undisputed facts of the case and the reasonable inferences to be drawn from the general situation. When its findings are without evidence and in direct conflict with the undisputed facts, and all reasonable inferences which may be drawn from them, its determination may be reversed as error of law.

The Commission has found that the decedent was employed as a foreman by the Horseheads Construction Company, a corporation engaged in the business of structural ironwork at Horseheads, N. Y., and that for the purposes of his work his employer had sent him from New York to the place where the accident happened. In a sense these are facts, but they are not the important facts. The findings of fact by the Commission must be read in connection with the known facts of the case. The findings omit the material facts, and

do not decide the real question litigated, but evade it. They are so indefinite and vague that the undisputed facts render them valueless as the basis of an award. Accepting the meagre findings of fact as true, the undisputed facts not found show that the findings are immaterial to the question at issue, and that the claimants are not entitled to an award. The award, therefore, rests upon an error of law.

In a sense the company did send the decedent from New York to the place where the accident happened, and he was a foreman, but he was employed in recent years as foreman only from time to time as to particular jobs outside of the State, and he was not a foreman in the general and regular employ of the company, and the particular job for which he was employed in this case was outside of the State of New York, and by accepting such employment and entering upon that work he put himself beyond the provisions of the act.

We conclude, therefore, that at the time of the employment, and for a long time prior thereto, the decedent was not engaged in a hazardous employment in the State of New York, but was engaged in an independent service in the State of Pennsylvania, which employment does not come within the benefit of the act. The award should, therefore, be reversed upon the law and the facts, and the matter be remitted to the Commission for its further action.

All concurred; HOWARD, J., in result; COCHRANE, J., not sitting.

Award reversed and the matter remitted to the Commission for its action. The court finds the following facts, in addition to those found by the Commission: That the claimant was not a foreman or an employee of the construction company in the State of New York, and that he performed no service for it in that State, but was employed solely to perform services at Ford City, Penn., and received his injury in the course of his employment outside of the State of New York, and it disapproves of any findings inconsistent therewith. *Gardner v. Horseheads Const. Co.*, 171 App. Div. 66, January 5, 1916.

In *Pritz v. Beaumont Co.*, Claim No. 39670; 170 App. Div. 943, September, 1915, the Appellate Division had reversed an award of the Commission upon grounds similar to those of the Gardner reversal but without opinion.

12. *The injured employee neither resides in, nor is injured in New York State, though his contract of employment has been made there.*—The State Industrial Commission declined jurisdiction in the case of an employee resident of New Jersey and killed in West Virginia, though his contract of employment had been made in New York. It indicated that the compensation awarded by the Court of Appeals in the leading extra-territorial case of *Post v. Berger & Gohlke* was limited to employees resident of New York.\* It said: "Certainly the State of New

\* For the case of *Post v. Burger & Gohlke*, see below, p. 236.

York is not called upon to resort to the exercise of its police power to prevent the dependents of a resident of New Jersey who meets his death in West Virginia, from becoming a charge on the State of New Jersey." It further noted that the dependents of the nonresident employee injured outside of New York were in better status than the dependents of the nonresident employee injured inside New York because they were not deprived of the right of action for negligence. The ruling of the Commission was as follows:

LYON, Commissioner.—William J. Lloyd, the deceased, a resident of New Jersey, was employed in New York before our Compensation Law was passed, and his employment continued until his death.

The employer was covered for compensation under the New York Law by the Employers' Mutual Insurance Company. It was covered for general liability in West Virginia by the General Accident Insurance Company. Mr. Lloyd was sent to West Virginia to work, where he received an accident which proved to be fatal. It is evident that since the General Accident's policy does not cover compensation under the New York act, this Commission has no jurisdiction over that company. Did the Employers' Mutual Insurance policy cover the accident to the deceased? I think not.

While the contract of hiring was made in New York State, Mr. Lloyd did not reside, nor was he injured in New York. The Court of Appeals held in *Matter of Post*, that our Compensation Law is to be read into every contract of employment made in New York with an employee who is a resident of this State, and entitles the employee or his dependents to compensation no matter where the injury was received. The court did not definitely decide whether *the place of contract* was a necessary element in its decision, and I am not sure but a New York workman can secure compensation under our act without regard to either the place of contract or the locality where he is injured, provided this Commission can secure jurisdiction of the person of the employer.

The constitutionality of our act has been sustained, as I understand it, on the ground that it is a proper exercise of the police power of the State, growing out of the fact that injured workmen, or their dependents, in case of their death, are likely to become a public charge, unless provision is made for their maintenance.

This reason for the law does not apply in this case, much as we may sympathize with Mr. Lloyd's widow. Certainly the State of New York is not called upon to resort to the exercise of its police power to prevent the dependents of a resident of New Jersey who meets his death in West Virginia, from becoming a charge on the State of New Jersey. It may be that the authorities of New Jersey may have jurisdiction to enforce compensation to Mr. Lloyd's dependents under the New Jersey act, but I am of the opinion that this Commission has no jurisdiction to grant compensation.

There is another reason why our law ought not to be construed to protect the dependents of Mr. Lloyd in this case. Had Mr. Lloyd although a resident of New Jersey, received his fatal injuries in the State of New York, his dependents ought to have relief under our act because in that event our act would have taken away from Mr. Lloyd's representatives and next of kin their right of action for negligence, if negligence lay at the foundation of the accident, since in that event in a suit for negligence in the State of his residence, the cause of action would have to rest upon the law of the State in which he was injured. So too, the fatal accident to Mr. Lloyd having occurred in the State of West Virginia, our statute can have no effect to deprive the next of kin of their right of action and they can no doubt have recourse in the State of West Virginia either to their action at law for damages for negligence or to a compensation law of that State if such exists. I, therefore, can see no way by which the widow can be compensated under our act and I advise that an award be denied. *Lloyd v. Power Specialty Co.*, S. D. R., vol. 7, p. 409, February 3, 1916.

The Supreme Court has held that an action under the Compensation Law of New Jersey cannot be brought in New York courts merely because of alleged inability to secure personal service upon defendant in New Jersey. The case is as follows:

NEWBURGER, J.: The complaint alleges that in the month of June, 1914, at Fort Lee, Bergen county, N. J., defendant engaged plaintiff, then and now a resident of New Jersey, to do certain plastering work in said state, and that on the 18th day of June, 1914, while plaintiff was in the defendant's employ under said contract, and in the discharge of his duties, he received a certain injury, causing him to lose the use of his right hand, and that the defendant had notice of such injury. The complaint further sets out the act of the state of New Jersey known as the Compensation Law. That pursuant to such act plaintiff, within fourteen days after the injury, caused the defendant to be notified thereof. That the plaintiff was receiving wages from the defendant at an average of \$27.50 per week. That plaintiff and defendant have failed to agree on the claim for compensation. That pursuant to section 18 of said act, on or about the 31st day of October, 1914, plaintiff presented a verified petition to a judge of the Court of Common Pleas for the county of Bergen, state of New Jersey, setting forth his injury and all the necessary information required under said section. That the judge of said court thereupon made an order requiring the defendant to appear for a hearing; that it was impossible to serve the defendant, which had removed its place of business to the state of New York, in which state it was incorporated, and that by reason of said injury the plaintiff demands the sum of \$1,500 as provided under the laws of the state of New Jersey. The defendant has demurred to this complaint and raises the question of jurisdiction. Section 18 of chapter 95, Laws of 1911 of the state of New Jersey, provides that in case of a dispute or failure to agree upon a claim for compensation between employer and employee either party may submit the claim to the judge of the Court of

Common Pleas of such county as would have jurisdiction in a civil case. It will thus be seen that the forum is provided under such law. This action being a statutory one must be strictly construed. The mere fact that the complaint alleges that personal service could not be obtained on the defendant is no ground for bringing the action in this court. Demurrer sustained. *Lehmann v. Ramo Films, Inc.*, 92 Misc. 418, November, 1915.

13. *Accident due to negligence of a railroad engaged in interstate commerce.*—Federal law regulative of interstate commerce excludes the Workmen's Compensation Law of New York in so far as the coverage of the two is common.

"The Federal Constitution in express terms grants to Congress jurisdiction over interstate commerce. The exercise by Congress of a power granted to it by express terms supersedes all legislation on the same subject by the states."

This general principle, says the Court of Appeals, has

"been so often enunciated by the Supreme Court of the United States that" it is "no longer open to dispute. \* \* \* Another principle which has been enunciated with the same clearness is that when the Federal and State governments have jurisdiction to enter the same sphere the state may legislate upon matters within that sphere until such time as Congress shall prescribe regulations upon the same subject." *Winfield v. N. Y. C. & H. R. R. R. Co.*, 216 N. Y. 287, Nov. 23, 1915.

The State of New York, in its Workmen's Compensation Law, has chosen to so legislate upon the matter of accidental injuries in interstate commerce as to cover them to the full extent that Congressional regulations do not cover them. The Court of Appeals, ruling upon this point, says:

"Literally construed, section 114 (of the Workmen's Compensation Law) makes the statute apply only to intrastate work, either done by itself or in connection with, but clearly separable and distinguishable from interstate or foreign commerce. But though the section is awkwardly phrased, it is manifest that a broader application was intended, else the clause 'for whom a rule of liability or method of compensation has been or may be established by the congress of the United States' is meaningless. The legislature evidently intended to regulate, as far as it had the power, all employments within the state of the kinds enumerated. The earlier sections are in terms of general application, and section 114 which is headed 'Interstate Commerce' is one of limitation, not of definition. Its obvious purpose was to guard against a construction violative of the Constitution of the United States, and so it provided that the act should apply to interstate or foreign commerce, 'for

whom a rule of liability or method of compensation has been or may be established by the congress of the United States,' only to the extent that intrastate work affected may or shall be clearly separable or distinguishable therefrom. In other words, the legislature said that it did not intend to enter any field from which it had been or should be excluded by the action of the congress of the United States. But it is said that congress may at any time regulate employments in interstate or foreign commerce, and that the case is one in which a rule 'may be established,' etc. Again, the spirit, not the letter, must control. If it had been intended to confine the application of the act to intrastate work, the legislature would doubtless have said so in a sentence. The words 'may be' should be construed in the sense of 'shall be.'" *Jensen v. Southern Pacific Co.*, 215 N. Y. 521, 522, July 13, 1915.

Since, then, Federal law and the Workmen's Compensation Law of New York may both apply to accidental injuries of employees engaged in interstate commerce, and, taken together, may and do completely cover such accidents, the important question, and the only question, that follows is: Are there any regulations of Congress that conflict with the Workmen's Compensation Law of New York? Cases in the courts have thus far involved but one law of this description, the so-called Federal Employers' Liability Act, which is restricted in its application to accidents involving negligence of interstate carriers by railroad (Acts of 1907-8, ch. 149). Since none of these cases have originated as actions for negligence and all of them have originated as compensation claims, their consideration properly falls under the later title, "Coverage from the viewpoint of Workmen's compensation." They are presented there, pp. 162-181. It is sufficient in this connection to say that they will be found to narrow the application of the law of negligence to accidental injuries arising in the interstate commerce employments enumerated under Workmen's Compensation Law, § 2, not only to railroad accidents strictly but to railroad accidents in which the accident is due to the railroad's negligence.\*

14. *The accident occurs upon waters subject to the admiralty jurisdiction of the United States courts.*—The decision in *Walker v. Clyde Steamship Co.*, 215 N. Y. 529, is determinative of a

\* No cases of interference between the Federal Workmen's Compensation Act (Acts of 1907-8, ch. 236; 1908-9, ch. 179; 1910-11, ch. 285 and 1911-12, chs. 87, 255), which is restricted in application to artisans and laborers employed by the United States, and the Workmen's Compensation Law of New York seem to have arisen.

question of conflict between the jurisdiction of the State Workmen's Compensation Commission and the Federal District Courts. Since it is a compensation case, passed upon by the state courts of New York, it is properly presented under the later title, "Coverage from viewpoint of workmen's compensation" (see p. 181). It is sufficient in this connection to say that, under the decision, an employee injured upon the waters of New York State that are subject to the admiralty jurisdiction of the United States courts has a remedy in admiralty for negligence concurrently or alternatively with his right to compensation. The admiralty jurisdiction of the Federal District Courts, according to judicial decisions, extends to the Hudson and Saint Lawrence rivers and their navigable tributaries; to Lakes Erie, Ontario and Champlain and their navigable tributaries; to the Erie canal and presumably to other canals that may be links of interstate and foreign commerce. The tributaries may be wholly within the State, as, for example, the Buffalo river.\*

#### C. Coverage from the Viewpoint of Workmen's Compensation.

As has been said, the subject of coverage may be approached from two opposite main points, the coverage of the law of negligence or the coverage of the law of compensation. The first having been considered, the second is in order. It presents the task of defining or outlining the outward limits or boundaries of the law of compensation as far as the court and commission decisions have indicated what they are. The Workmen's Compensation Law of New York occupies a certain field from which legislation by the Congress of the United States has not excluded it, but may exclude it at any time. It has a certain concurrent coverage—a coverage in common with admiralty law and the law of tort. Its scope is broadened by a coverage incidental to the hazardous employments to which its terms restrict it. Its territorial coverage extends away from the employer's immediate plant not only to the utmost bounds of the State of New York but to the other

\* See Black's Constitutional Law, 3d Ed., 1910, pp. 157-162; Bouvier's Law Dictionary, 8th Ed., 1914, p. 141, title "Admiralty." Concerning the status of the Erie Canal, consult *The E. M. McChesney*, 8 Ben. 150, Fed. Cas. No. 4, 463; *The Robert W. Parsons*, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73.

states of the Union and to foreign countries. Theoretically, nothing prevents it extending to navigation of the high seas and to aviation of the upper air. The element of time, because of fixed hour limits of work, has a part in the determination of the jurisdiction. Peculiar causes of injury and the subtle connections of injury with ensuing infection or disease demand coverage adjudication. The definition of employment and the relationship of coemployment enter into the coverage question. The following presentation substantiates these general statements and at the same time takes up in detail the numerous points of doubt or conflict passed upon by the court and commission decisions.

The Workmen's Compensation Law applies to accidental injuries arising in the hazardous employments to which section 2 of its text restricts it, *even when*

*a. The injured employee is working for a railroad engaged in interstate commerce:*

1. *If the action is not due to the railroad's negligence.*—Section 114 of the Workmen's Compensation Law provides that the law as a whole shall not apply to employees engaged in interstate commerce "for whom a rule of liability or method of compensation" has been or shall be established by Congress, except for such portion of their employment as is clearly intrastate as distinguished from interstate. The Workmen's Compensation Law has been held by the Court of Appeals, however, to apply even to accidents on interstate railroads, except those that are due to the *negligence* of employers, for which the Federal Employers' Liability Act is held to be the sole remedy.

In the following case, the claimant—a maintenance of way employee of the New York Central Railroad—while engaged in tamping ties on a track used both for state and interstate commerce was injured in the right eye by a stone which flew up from the ground. There was no fault or negligence upon the part of the railroad company. The Industrial Commission made an award, which, after having been sustained by a vote of three to two in the Appellate Division, has been upheld by the Court of Appeals. The latter court, after pointing out that Congress has, under the commerce clause of the Federal constitution, jurisdic-



tion over interstate commerce, also pointed out that, until Congress actually exercises such power, the states may legislate within that sphere. The Federal Employers' Liability Act was held to be the exclusive remedy for employees of interstate railroads only so far as injuries due to *negligence* are concerned. That act did not, however, enter the field of compensation for industrial accidents not due to the negligence of the employer. Hence the Workmen's Compensation Law which, said the court, is "radically different in principle, purpose, scope and method," is not in conflict with the Federal liability act. The two statutes do not deal with the same subject matter.

Following are the opinions in the Appellate Division and in the Court of Appeals. The majority opinion in the Appellate Division was written by Justice Kellogg, with which Justices Lyon and Woodward concurred. Presiding Justice Smith wrote a dissenting opinion, with which Justice Howard concurred. There was no dissent in the Court of Appeals from the opinion written by Judge Seabury.

(*Winfield v. N. Y. C. & H. R. R. R. Co., Appellate Division*).

KELLOGG, J.: The claimant was injured while engaged in tamping ties upon the appellant's track at Lake Katrine, Ulster county, N. Y., which was used both for State and interstate commerce. While thus tamping the ties a stone flew up and injured his eye, for which injury this claim is made. We may assume that if he had been injured by the defendant's negligence he could maintain an action therefor under the Federal Employers' Liability Act. It is urged that he is not entitled to the benefit of the Workmen's Compensation Law as he was injured while engaged in interstate commerce, but can seek only such remedies as the Federal Employers' Liability Act gives him.

The Federal Employers' Liability Act is entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases." \* The title clearly indicates that it does not cover all the grounds of liability, but that the act relates only to the particular cases expressly provided for in it. The provision of the act relate solely to liability on account of negligence. The several States, therefore, in the exercise of their police power, may make such laws and regulations for the protection of the laborers within the State as may seem best, unhampered by the Federal Employers' Liability Act, except so far as they attempt to prescribe a liability for negligence or the remedies therefor in interstate commerce.

The Workmen's Compensation Law† has no reference to the question of the negligence of the employer and creates no liability or remedy for negligence.

\* See 35 U. S. Stat. at Large, 65, chap. 149, as amd. by 36 id. 291, chap. 143.—[Rep.]

† See Consol. Laws, chap. 67; Laws of 1913, chap. 816, as re-enacted and amd. by Laws of 1914, chaps. 41, 816.—[Rep.]

By section 19 of article 1 of the Constitution, the Legislature has the power to enact laws "for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a State or other system of insurance or otherwise, of compensation for injuries to employees, or for death or employees resulting from such injuries without regard to fault as a cause thereof," except in certain cases.

The Workmen's Compensation Law was enacted under that provision and the Legislature evidently intended to take care of the workmen through a State system of insurance. The State insurance fund makes the compensation to the injured employee. By insuring in the State fund the employer is under no liability to pay and does not pay anything to his employee. The premium of insurance represents the only expense to him imposed by the law and the Constitution provides that the moneys paid by him under the act shall be held to be a proper charge in the cost of operating the business.

While the moneys are paid to the injured employee by the State, nevertheless they have been collected from the various hazardous employments upon the basis of the number of men employed, the payroll and the supposed risks of each employment. If the appellant had insured in the State fund, the fund would have received on account of this injured employee moneys by way of premiums which are based upon his service upon the track and upon the theory that he is insured while so at work. The employer has been guaranteed by the act protection from any liability on account of accidents occurring in its business and the employee has been promised protection from such accidents. The State fund, therefore, would not be in a good position to contend that the moneys so received were not applicable to compensate for an injury received in an employment which it has assessed and insured. The moneys in its hands for the benefit of injured employees would in part be paid for carrying this very risk.

It is true that the statute permits the Compensation Commission to accept the employer as a self-insurer, if he satisfies it of his ability to respond or furnishes to it proper security, but when he becomes a self-insurer he, in effect, takes the place of the State fund as an insurer and his liability therefor under the act is not strictly as an employer but as a self-insurer. He has taken the place which the statute primarily intended the State fund to take and necessarily assumes corresponding liabilities. He may choose not to be a self-insurer and not to insure in the State fund and to obtain insurance in a company or association authorized to make such insurance, but the company or association is simply taking the place of the State fund. The self-insurer, the company or the association pays the losses to the fund. The fund in all cases, through the Commission, makes the compensation to the employee.

The statute should be given a broad and liberal construction in order to carry out the beneficent purposes for which it was enacted. It is not a law fixing a liability for negligence or fixing a liability upon or creating a cause of action against the employer, but, as we have said, is in substance a provision that the State will make compensation to injured employees in hazardous employments from moneys which it has collected or secured from the employers. It is a State system of insurance. No liability other than for premiums is imposed upon the employer except by way of penalty. He may relieve himself from the payment of premiums by becoming a self-insurer.

The State may regulate business and it is its duty to regulate businesses of such a hazardous nature that the employees are exposed to great dangers from risks incident to them. The people, in adopting the constitutional provision, and the Legislature, in enacting this statute, recognized the fact that these hazardous employments as a whole must contribute to the compensation for the injuries they ordinarily inflict upon the employees engaged in them. I think the real intent and purpose of the act is plain when it is treated purely as a requirement of insurance in the State fund and that the provision for a self-insurer and other insurance carriers are makeshifts adopted for the convenience of the employer but which should not in any way infringe upon the integrity or the real spirit of the act. The legislative intent primarily is not to require any employer to make satisfaction to his employee for an injury sustained but to make all the hazardous businesses contribute to a fund which shall compensate for any injury received in any one of such employments. The fact that the employer takes advantage of certain provisions in the act and becomes a self-insurer does not affect the construction of the act nor work to the prejudice of the employees engaged in that particular employment. The act was intended to benefit equally all employees engaged in such employments. There was no intent to allow the employer by his act to change the purposes of the law or to affect the benefits which his employees were entitled to under it and which other employees receive. An employee is not prejudiced by the fact that his employer qualifies as a self-insurer or insures otherwise than in the State fund. The rights of the employee under the act do not depend at all upon the manner in which his employer has elected to carry his insurance.

The Federal statute giving a remedy in certain cases of negligence does not interfere with the rights of the State to require that every employee in a hazardous employment shall be insured.

It is urged that the claimant may claim under the Federal and the State statutes, thus securing a double compensation. That question must be met when it arises. If he resorts to the Compensation Law and receives compensation thereunder, probably, within the spirit of section 53 of that law, he has no remedy against the employer. If he receives compensation under either law, it may well be held that he has received pay for the injury which he has sustained upon a remedy chosen by him and that his election of one of such remedies prevents him from resorting to the other. It is urged, however, that the employer in an interstate business may be put in an anomalous position by being required to show his own negligence in order to defeat the claim of the employee under the Compensation Law, if it is held that the Compensation Law does not apply to cases where the injury was caused by the negligence of the employer. If a claim is made against the employer under the Compensation Law and he claims that law has no effect because the employee was injured in interstate commerce by the negligence of the employer, it will then be for the court to determine whether the employer can urge his own negligence to defeat the employee's claim for compensation. If he were not negligent, compensation must be made. Can he claim exemption by proving his own wrong? These questions present no serious objection to the interpretation we contend for. We are not unmindful of the fact that some recent amendment to the Compensation Law, since the injury in question, permits

settlement in some cases by the self-insurer with the approval of the Commission. It is not for us to consider the wisdom or the unwisdom of such amendment. It does not bear upon this case, and does not affect the broad principle that the original statute contemplated that the State was to settle for the injury from moneys which it had collected or caused to be secured to it, not from a particular employer but from all hazardous employments.

This resident of the State, working as a common laborer at the place of his residence upon a railroad track, who, perhaps, never was in or upon a railroad car, should not be deprived of the benefits of this remedial statute enacted for his benefit simply because at times interstate trains passed over the road upon which he was working. The statute should not be killed by refinements or construed to death, but, within the spirit of section 21 of the act, should be applied to every case arising in such hazardous employments where a Federal statute does not necessarily conflict with it.

Congress has not established any general rule of liability or method of compensation between employers and employees. It has by the Federal Employers' Liability Act only regulated the method of enforcing liability in cases of negligence, and that statute is not the action of Congress referred to in section 114 of the Compensation Law. If Congress makes a general regulation as to liability or compensation for accident occurring from the business without regard to fault as a cause thereof, as distinguished from actions of negligence, then section 114 must be considered. I favor an affirmance.

All concurred, except SMITH, P. J., dissenting in opinion, in which HOWARD,

J., concurred.

SMITH, P. J. (dissenting):

In this case the claimant was injured while engaged in tamping ties upon the appellant's track, which was used both for State and interstate commerce. While thus tamping the ties a stone flew up and injured his eye, for which injury this claim is made. It is assumed by all counsel that the claimant was injured while engaged in interstate commerce, and had this injury resulted from defendant's negligence the claimant would have a right of action under the Federal Employers' Liability Act. The claim was allowed by the Compensation Commission with one dissenting vote, upon the ground apparently that inasmuch as the accident was not claimed to have been caused by any negligence on the part of the defendant the act of Congress had not assumed to regulate the liability of the defendant, and for such reason the Compensation Law of the State was applicable thereto.

By section 114 of the Compensation Act it is provided that the provisions of this chapter shall apply to a workman engaged both in intrastate and interstate commerce "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce." Congress has assumed to legislate upon the liability of masters to their servants where the masters are engaged in interstate commerce. (35 U. S. Stat. at Large, 65 chap. 149, Laws of 1908, as amd. by 36 id. 291, chap. 143, in 1910.) These acts provide for a liability in excess of common-law liability. Upon the principle of *expressio unius exclusio alterius* the acts constitute a denial of liability except in the cases mentioned. In any

event a rule of liability is established by Congress directly within the terms of section 114 of the Workmen's Compensation Law, and the work in which the claimant was engaged was not severable from interstate commerce. Section 114 seems to contemplate cases where Congress had legislated either as to a rule of liability, or as to a method of compensation. It seems to have been within the mind of the Legislature that Congress might hereafter pass a Workmen's Compensation Act. Having limited, however, the effect of this Compensation Act to cases in which either a method of compensation or a rule of liability had been established, the intent would seem clear to exclude all cases where the party was engaged in work not severable from interstate commerce, as long as the rule of liability of master to servant, where the work was performed in connection with interstate commerce, had already been prescribed by Congress.

It has been held in Illinois, which apparently did not have this provision in its Compensation Act, that where the accident happened without negligence of the employer there was no conflict between the State and Federal jurisdiction; that the Federal act attempted to regulate interstate commerce, while the State act was merely a method of compensation operative only after the act was accomplished. (*Staley v. Illinois Central R. Co.*, 186 Ill. App: 593.) If this be sound law, of which I have grave doubts, nevertheless, the limitation contained in section 114 of our Compensation Act to my mind creates a different rule.

Nor can it be claimed that the rule of liability established by the Federal act is simply a rule of liability in case of negligence, so that as far as a State compensation act authorizes recovery for injuries without negligence, it does not conflict with the Federal Liability Law. This cannot be held in the first place as heretofore indicated, because of the limitation in the act itself where either a rule of liability is created or a method of compensation by the Federal government. But also to my mind the distinction is impracticable. A party injured could then claim compensation whether his injury was the result of the negligence of the employer or without negligence, and it would be unreasonable to compel the employer to prove his own negligence to show that the case was one within which the rule of liability was established by the Federal law. The result would be in most cases to give to the injured party an option to claim under the Compensation Act, or under the Federal Liability Law. Apparently to prevent just this situation, as well as to avoid antagonism in a field already occupied by the Federal statute, section 114 was inserted into this act denying relief to one engaged in interstate commerce, in case either a Federal liability law existed or a Federal compensation act.

As far as the constitutionality of the Compensation Law is challenged, at the March term a decision was handed down by this court affirming its constitutionality, so that the question is not now open for our consideration. We are of the opinion that the appellant by filing a bond has not waived any objection to the unconstitutionality of the act, because in the first place the penalties for not filing a bond, if one be required, are so great as to make the filing of the same necessary for the protection of the appellant, and in the second place, within section 114 of the Compensation Law the defendant is clearly liable under the act where the duties of an employee are clearly separable from interstate commerce. For the reason stated the determination

should be reversed. Howard, J., concurred. Award affirmed. *Winfield v. N. Y. C. & H. R. R. Co.*, 168 App. Div. 359, May 7, 1915.

(*Winfield v. N. Y. C. & H. R. R. Co.*, Court of Appeals.)

SEABURY, J.: The claimant was employed in connection with the general repair and maintenance of the tracks of the employer, the New York Central and Hudson River Railroad Company. While tamping ties he was struck in the right eye by a stone which came up from the ground. The workmen's compensation commission awarded him compensation at the rate of \$6.54 weekly for two weeks. The claimant's employer at the time of the accident was engaged in interstate commerce. The appellant contends that because the claimant when injured was employed by a railroad company which was then engaged in interstate commerce, the Federal Employers' Liability Act alone measures the claimant's right to recover, and as there can be no recovery under that act, because the injury to the claimant was not the result of negligence, the claimant is remediless. This appeal makes it necessary for us to determine whether this contention is correct. The question presented has not as yet been determined by any decision of the Supreme Court of the United States or of this court. In the absence of controlling precedent we must endeavor to reach a conclusion which shall be in accord with the established principles which underlie our dual system of government. The Federal Constitution in express terms grants to Congress jurisdiction over interstate commerce. The exercise by Congress of a power granted to it by express terms supersedes all legislation on the same subject by the states. In the exercise of the power so conferred Congress has prescribed the liability of carriers, for injuries resulting from negligence, to their employees while engaged in interstate commerce. (35 U. S. Stat. 65.) The Federal Employers' Liability Act is, therefore, in so far as it attempts to prescribe the rules of liability for injuries resulting from negligence, paramount and exclusive and must so continue until Congress shall see fit to remit the subject to the reserved police powers of the state. These general principles have been so often enunciated by the Supreme Court of the United States that they are now no longer open to dispute. (*Second Employers' Liability Cases*, 223 U. S. 1; *Adams Express Co. v. Croninger*, 226 U. S. 491; *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370; *Erie R. R. Co. v. New York*, 233 U. S. 671; *Morgan's S. S. Co. v. Louisiana*, 118 U. S. 455, 464; *Hennington v. Georgia*, 163 U. S. 299; *Rasmussen v. Idaho*, 181 U. S. 198.) Another principle which has been enunciated with the same clearness, is that when the Federal and state governments have jurisdiction to enter the same sphere the state may legislate upon matters within that sphere until such time as Congress shall prescribe regulations upon the same subject. (*Sinnot v. Davenport*, 22 How. (U. S.) 227, 243; *Ex parte McNeil*, 80 U. S. (13 Wall.) 236; *Smith v. Alabama*, 124 U. S. 465; *Gulf, Colorado & Santa Fe Ry. Co. v. Hefley*, 158 U. S. 98; *Mo., Kans. & Tex. Ry. Co. v. Haber*, 169 U. S. 613; *Olsen v. Smith*, 195 U. S. 332; *Reid v. Colorado*, 187 U. S. 137.) In the light of these principles let us examine the Federal Employers' Liability Act and the Workmen's Compensation Law of this state and endeavor to ascertain whether they assume to deal with the same subject-matter. If upon examination it is found that they do, then in so far as employers and employees are engaged in interstate commerce, the provisions of the Federal statute must be regarded

as paramount and exclusively operative. If upon examination it is found that these two statutes do not cover the same subject-matter we will be in a position to distinguish the different spheres within which each may be given effect. A recognition of the principles upon which the Federal and state statutes are founded will demonstrate that they are not *in pari materia*. The Federal Employers' Liability Act prescribes the rules under which certain employers are liable to their employees for injuries which result to the latter from negligence. The Workmen's Compensation Law is radically different in principle, purpose, scope and method from the Federal Employers' Liability Act. It inaugurated an entirely new method of dealing with industrial accidents. Under its provisions compensation paid to the employee under the state statute is the result of injury arising in the course of employment and is paid regardless of fault or contract. The *principle* underlying the state statute is that as injuries to workmen are necessarily incident to the operation of certain hazardous occupations, the expense of compensating the employees for such injuries is properly chargeable upon the occupation. The *purpose* of this act was to establish an insurance fund to which employers are required to contribute, out of which fund compensation to the workmen is paid and contribution to which by the employer relieves him of further liability. The *scope* of the act is much broader than the Federal Employers' Liability Act, because under its provisions the employee is awarded compensation for all accidental injuries arising in the course of his employment whether they result from negligence or not, which are not self-inflicted or sustained as the result of intoxication. The *method* by which compensation is given to the employee is different from the method by which redress may be secured in an action brought under the provisions of the Federal Employers' Liability Act. Under the state statute the injured employee presents his claim to an administrative board or commission. Notice is given to the parties interested. The proceedings are informal. The compensation awarded the employee is not such as is recoverable under the rules of damages applicable in actions founded upon negligence. It is based on loss of earning power and compensation for medical, surgical or other attendance or treatment or funeral expenses. Perhaps, without inaccuracy, it may be said that the primary purpose of this act was to give compensation in those cases where no claim of negligence on the part of the employer could reasonably be made. Having in mind the different *principles* which underlie the two statutes, the different *purposes* sought to be accomplished by them, the restricted *scope* of the Federal statute and the broad scope of the state statute and the different *method* by which redress is obtained under these statutes, can they reasonably be said to cover the same subject-matter? We are of the opinion that they cannot be so regarded. We think it is evident, also, that Congress has recognized the difference between these two *kinds* of statutes. In enacting the Federal Employers' Liability Act it intended to occupy and exclusively pre-empt the field in which the liability of certain employers engaged in interstate commerce to their employees is prescribed when the latter were injured as the *result of negligence*. It did not intend to enter upon the field of compensation for industrial accidents which were not the result of negligence, but left that field open for occupancy by the state until such time as it should assume to legislate upon this subject. The view that Congress intended to observe the distinction between the two kinds

of statutes referred to, is fortified by the fact that it has passed a workmen's compensation law exclusively applicable to Federal employees in which liability is not made to depend either upon fault or contract (35 U. S. Stat. 556), whereas, as to certain private employments it has regulated the subject only in those cases where the employee is injured as the result of negligence (35 U. S. Stat. 65). The workmen's compensation statute of this state was not in any way designed to conflict with the authority of Congress over interstate commerce. As was said by this court in *Matter of Jensen* (215 N. Y. 514, 521): "Its obvious purpose was to guard against a construction violative of the Constitution of the United States." It is true, of course, that the act is to be judged not only by its purpose but by what it provides may be done under it. Even considering it in the light of this principle, we think that it may lawfully be held to cover such a case as the present without in any way trespassing upon the field of Federal jurisdiction. As yet, as to private employments, Congress has not assumed to make any provisions as to compensation for accidents not the result of negligence, and Congress not having entered upon this field the state may lawfully do so, until such time as Congress shall assume to exercise its power over this subject. The moment Congress shall enter upon this field all state regulations upon the subject will be abrogated. The field which Congress has pre-empted by the enactment of the Federal Employers' Liability Act is far removed from that of awarding compensation for industrial accidents that are not the result of negligence. Moreover, the present Workmen's Compensation Law was deemed a necessary exercise by the state under modern industrial conditions of its police power. (*Matter of Jensen, supra.*) The means that have been employed do not go beyond the necessities of the case or impose any unreasonable condition upon interstate commerce. The state has not assumed to supplement the action of Congress. It has legislated in a sphere into which as yet, Congress has not assumed to enter. When Congress shall manifest a purpose to enter this field there can be no division of the field of regulation. When the Federal and state statutes relate to the same subject-matter and prescribe different rules, the state statute must yield. When, as in the case under consideration, the Federal and state statutes do not relate to the same subject-matter, the fact that Congress, when it so desires, may pre-empt the field does not render the state statute inoperative until such time as Congress assumes to exercise the power. "It is the exercise, and not the existence, of the power that is effectual and exclusive." (*Ex parte McNeil*, 80 U. S. [13 Wall.] 236, 240.) It was well said by Mr. Justice HARLAN in *Reid v. Colorado* (187 U. S. 137, 148): "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested." In *Missouri, Kansas & Texas Railway Company v. Haber* (169 U. S. 613 at p. 623) it was said by the same learned justice: "May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserve power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." (See, also, *Smith v. Alabama*, 124 U. S. 465.) In



*Olsen v. Smith* (195 U. S. 332) it was held that state laws regulating pilotage, although regulative of commerce, fall within that class of powers which may be exercised by the state until Congress has seen fit to act upon the subject. In *Reid v. Colorado* (*supra*) the court asserted that when the entire subject of the transportation of live stock from one state to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or state regulations in respect to such matter and covering the same ground would cease to have any force whether formerly abrogated or not. The court, however, held that the act of Congress (23 U. S. Stat. ch. 60) known as the Animal Industry Act did not cover the whole subject of the transportation of live stock from one state to another and that, therefore, the state may protect its people and their property against such dangers. That case considered the question whether a statute of the state of Colorado was in violation of the Constitution of the United States or in conflict with the power of Congress over interstate commerce. In rendering the opinion of the court Mr. Justice HARLAN said: "But the difficulty with the defendant's case is that Congress has not by any statute covered the whole subject of the transportation of live stock among the several states, and, except in certain particulars not involving the present issue, has left a wide field for the exercise by the states of their power, by appropriate regulations, to protect their domestic animals against contagious, infectious and communicable diseases. [At page 147.] \* \* \* The state—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States." (At page 151.) In *Erie Railroad Co. v. New York* (233 U. S. 671) the United States Supreme Court had under review a state and Federal statute both of which assumed to prescribe the hours of service for certain operatives engaged in interstate commerce. The state statute assumed to supplement the Federal statute and to legislate upon the same subject-matter and the court held that the act of Congress was paramount and that the state statute must yield to it.

The state in the Workmen's Compensation Law has assumed to deal with all industrial accidents whether they be the result of negligence or not. The suggestion is made that in so doing the state has required employers to contribute to an insurance fund upon the assurance that such contribution relieves them of all further liability and yet so far as accidents resulting from negligence occur to those engaged in interstate commerce, the employer may still be subject to a liability under the provisions of the Federal Employers' Liability Act. This apparent difficulty disappears when we distinguish between the different spheres in which the Federal and state statutes operate. So far as accidents result to those engaged in interstate commerce, the whole subject is, when Congress assumes to deal with it, excluded from the operation of state regulation. As to accidents to those engaged in interstate commerce resulting from negligence, which are within the Federal Employers' Liability Act, Congress has assumed to deal with the subject, and, therefore, all state regulations within that sphere must be inoperative. In so far as the separate and distinct field of compulsory insurance against accidents, not the result of negligence by the employers, is concerned, Congress has not assumed

to act upon the subject, and until such time as Congress does enter this distinct and separate field, it is open to occupancy by the state, provided only that in occupying it the state does not go beyond the necessities of the case, or unreasonably burden the exercise of the privileges secured by the Constitution of the United States. While it is true that our state statute in terms is broad enough to cover accidental injuries caused by negligence, and those that are not caused by negligence, that portion of it which affects accidental injuries caused by negligence resulting to those engaged in interstate commerce, which are within the Federal Employers' Liability Act, is as ineffective and inoperative as if it had not been enacted. The legislature intended that injuries resulting from negligence to those engaged in interstate commerce, which are within the Federal statute, should not be affected by the provisions of the state statute. This is evident from the provisions of section 114 of the Workmen's Compensation Law (Cons. Law, ch. 67; L. 1914, ch. 41). That section provides as follows:

*"Interstate Commerce.* The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

In *Matter of Jensen (supra)* this court pointed out that literally construed, section 114 "makes the statute apply only to intrastate work, either done by itself or in connection with, but clearly separable and distinguishable from, interstate and foreign commerce." The court then remarked that "though the section is awkwardly phrased, it is manifest that a broader application was intended." (p. 521.) Thus viewing the matter, we held in that case that the provisions of the state statute applied to accidental injuries received in interstate as well as intrastate work except those injuries received while engaged in interstate or foreign commerce for which "a rule of liability or method of compensation has been or shall be established by the Congress of the United States." Writing for the court in that case Judge MILLER, referring to the statute, said: "In other words, the legislature said that it did not intend to enter any field from which it had been or should be excluded by the action of the Congress of the United States. But it is said that Congress may at any time regulate employments in interstate or foreign commerce, and that the case is one in which a rule 'may be established,' etc. Again, the spirit, not the letter, must control. If it had been intended to confine the application of the act to intrastate work, the legislature would doubtless have said so in a sentence. The words 'may be' should be construed in the sense of 'shall be.'" (p. 522.) Moreover in the last sentence of section 114 it is made clear that the act applies to employers and employees working only in the state, "subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of Congress." In so far as employers and employees working in this state are

engaged in interstate commerce and injuries result to the employees which are not the result of negligence and are not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another or result from his intoxication while on duty, Congress not having legislated upon the subject, the state statute is operative. The insurance fund created by the state statute is not for the benefit of those who are within the Federal statute. Nor does the state statute assume to release employers who contribute to the insurance fund from liability imposed by the Federal statute. In all such cases the state statute imposes no liability and does not relieve from liability for such accidents. All accidents of that character are governed by the Federal Employers' Liability Act. In regard to such accidents it is not within the jurisdiction of the state either to create a liability or to relieve from it. The contribution which the employer makes to the insurance fund under the state statute relieves him of liability to his employees in cases which are not within the Federal statute. But accidents, resulting from negligence to those engaged in interstate commerce, which are within the Federal statute, are now exclusively within the sphere of Federal jurisdiction and as to them the state cannot create or take away liability. It is also urged that the state statute imposes inevitable liability upon the employer and sanctions in some cases a two-fold recovery. If a claim is made under the state statute against an employer and the employer pleads that the employee was injured in interstate commerce as a result of the employer's negligence the question will be presented whether the employer shall be permitted to urge his negligence to defeat the claim of his employee. That question is not now presented and we think discussion of it should be reserved until it arises. This much, however, without impropriety may be said, if the claim of the employer that the injury was the result of his negligence should be upheld, and the case should be within the Federal statute, the employer would not be subjected to a double recovery, because in this event there could be no recovery under the state statute. If the injury was not the result of negligence an award under the state statute could be made, but in such cases there could be no recovery under the Federal Employers' Liability Act and hence the employer could not be subjected to a double recovery.

The other questions urged upon us by the appellant have already been discussed in *Matter of Jensen (supra)* and do not require further discussion by us.

It follows that the order of the Appellate Division should be affirmed, with costs.

CHASE, CUDDERBACK, HOGAN and CARDOSO, JJ., concur; HISCOCK, J., not voting; WILLARD BARTLETT, Ch. J., absent. Order affirmed. *Winfield v. N. Y. C. & H. R. R. Co.*, 216 N. Y. 284, Nov. 23, 1915.

The Appellate Division, basing its decision upon the foregoing opinion in the *Winfield* case, has held in *Moore v. Lehigh Valley R. R. Co.*, that an employee injured without negligence of his employer while engaged in constructing a telegraph line for an

interstate railroad company is within the protection of the Workmen's Compensation Law. The Court of Appeals has affirmed the decision without opinion. The text of the Appellate Division's opinion is given below on page 199 under the heading "Injury while seeking shelter from storm," with which subject the opinion chiefly deals.

Awards upheld without opinion by the Appellate Division upon authority of the Winfield case are: *Stevens v. Lehigh Valley R. R. Co.*, S. D. R., vol. 3, p. 378; 171 App. Div. 961; *Hall v. Lehigh Valley R. R. Co.*, S. D. R., vol. 4, p. 441; 171 App. Div. 961; *Shea v. Lehigh Valley R. R. Co.*, 171 App. Div. 961; *Saxton v. Erie R. R. Co.*, 172 App. Div. 913; *Picol v. Lehigh Valley R. R. Co.*, S. D. R., vol. 4, p. 420; 172 App. Div. 913; *Sullivan v. Lehigh Valley R. R. Co.*, S. D. R., vol. 4, p. 406; 172 App. Div. 913.

Other awards in interstate commerce cases upheld by the Appellate Division without opinion are: *Welch v. N. Y., New Haven and Hartford R. R. Co.*, 170 App. Div. 926; *Gallien v. N. Y. Central & H. R. R. Co.*, 172 App. Div. 918; *Podkownski v. N. Y. Central R. R. Co.*, 172 App. Div. 918; *Porter v. N. Y. Central & H. R. R. Co.*, 172 App. Div. 918; *Potts v. Lehigh Valley R. R. Co.*, S. D. R. vol. 4, p. 421; 172 App. Div. 918; and *Quattrini v. D. & H. R. R. Co.*, S. D. R., vol. 5, p. 393; 172 App. Div. 918.

The State Industrial Commission has granted numerous awards of compensation to employees of railroads engaged in interstate commerce, basing its action in each case upon the statement that "the injury has not been occasioned by any negligence attributable to the employer." The employer seems in no instance to have pleaded his own negligence against an award, a situation which the opinion of the Court of Appeals in the Winfield case suggests might arise.

2. *If the work is other than railroad work proper.*—The Court of Appeals, in the important case of *Jensen v. Southern Pacific Co.*, drew a line between carriage by water and carriage by land as conducted by railroad corporations. The court declared the Federal Employers' Liability Act inapplicable to such carriage by water, the inference being that the Workmen's Compensation

Law is applicable even when the railroad corporation carrying by water is negligent. The pertinent part of the opinion is as follows:

"It is said that the appellant is a carrier by railroad, and that, therefore, the Federal Employers' Liability Act of April 22, 1908 (35 Stat. L. 65), prescribes the rule governing the employment in which the deceased was engaged. As far as this case is concerned the appellant is a carrier by water. Its business is transportation by steamships, which, as far as appears, may not even indirectly be related to transportation by railroad, certainly not by any particular line of railroad. It is significant that the earlier Federal statute of June 11, 1906 (34 Stat. L. 232), applied to 'every common carrier' engaged in interstate or foreign commerce, whilst the present act applies only to carriers by railroad. There is nothing in the act indicative of a purpose to apply it to carriage by water, if it happen to be conducted by a railroad corporation, and not otherwise — to apply one rule of liability to transportation by a steamship line, if owned and operated by a railroad corporation, and a different rule to precisely similar transportation not thus controlled. The Federal act provides a rule of liability of carriers by railroad for injury or death 'resulting in whole or in part \* \* \* by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.' The words 'boats' and 'wharves' may be given due effect by applying them to adjuncts or auxiliaries to transportation by railroad." *Jensen v. Southern Pacific Co.*, 215 N. Y. 522, 523, July 13, 1915.\*

3. *If the work consists in repairing an empty car that has been or will be used in interstate commerce.*—"The actual work being performed at the time of the injury determines its character and is the real test whether it is interstate or intrastate work." This sentence is from the decision of the Appellate Division affirming unanimously an award made by the Workmen's Compensation Commission, where the claimant had received an eye injury in defendant's repair shop while removing roof boards from a railway car belonging to a foreign company. The Federal Employers' Liability Act was held not to apply on the ground that the car, while being repaired, was not in interstate commerce even though its next trip happened to be an interstate one. The full text is as follows:

KELLOGG, J.: The claimant sustained his injury while at work in the car repair shops of the appellant at Colonie, N. Y. An empty car was brought into the shops to have its safety appliances repaired and for a new roof. The claimant removed some roof boards from the car, and while drawing the nails from them the head of a nail flew off and hit him in the eye. The boards

\* For the full text of the opinion, see p. 22.

were to be replaced on the car and the roof tinned. The car was in the shops from June seventeenth to July seventeenth. It was the property of the Quebec, Montreal and Southern Railway Company, and its home was in Canada. It does not appear when it came to the Delaware and Hudson Company's road. It left Hudson, Penn., May twelfth, with a load of anthracite coal for Brunswick, Me., passing through Mechanicville, N. Y., May thirteenth. By way of the Boston and Maine railroad it came to Eagle Bridge, N. Y., June sixteenth, empty, and from there was taken to the shops at Colonie for a new roof and repairs. It left the shops July seventeenth and went to Corinth, N. Y., empty; was there loaded with paper for Cleveland, O., returned to Rouse's Point and delivered to the Rutland Railroad Company July twenty-seventh, continuing an interstate trip.

The appellant contends that at the time of the accident the claimant was engaged in interstate commerce and that if he has any remedy he must look to the Federal Employers' Liability Act.

In *Illinois Central Railroad v. Behrens* (233 U. S. 473) the intestate was one of the crew attached to a switch engine operated exclusively in New Orleans. The crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once, and at times turning directly from one to the other. At the time of the injury they were drawing intrastate cars; the next movement of cars was to be interstate cars. It was held that the intestate was not at the time engaged in interstate commerce and the fact that the next cars to be moved were interstate cars was not material, the court saying the true test is the nature of the work being done at the time of the injury.

In *Barlow v. Lehigh Valley R. R. Co.* (214 N. Y. 118, 121) the court says: "It is an anomalous situation, and one to be remedied as far as possible by legislation, that an employer's liability to his employee may be governed by one rule at one moment and by an entirely different rule at the next, though the employee is all the time engaged in precisely the same kind of work. We are not disposed to increase the difficulty by drawing nice distinctions."

In that case cars loaded with coal came from Sayre, Penn., to the defendant's yard in Cortland. The coal was for the defendant's use at that station, for its engines used on intrastate or interstate commerce. Upon arriving the cars were placed upon a side track. The switching crew were about to place the cars upon the trestle for unloading, and the plaintiff, one of the crew, reached under the engine to examine a brake beam when the engineer suddenly backed the engine, causing the plaintiff's injury. The plaintiff was allowed to recover under the Federal Employers' Liability Act, the court remarking (at p. 119): "The transportation was not completed until the cars reached their destination, the trestle where they were to be unloaded. The interstate transportation was interrupted, but not terminated, when the cars were put on the siding in the Cortland yards."

In *Chicago, Milwaukee & St. Paul Railway v. Iowa* (233 U. S. 334) it was held that where a car of coal was shipped from Illinois to Davenport, Iowa, and after it arrived at Davenport the loaded car was transhipped to other places in Iowa, the shipment to Davenport was interstate commerce but the shipment from Davenport was a reshipment, a separate transaction, and intrastate commerce, subject to a State regulation which did not violate any Federal law.

These cases show that we are not to be governed by technicalities; that the Federal and State statutes are each to have a reasonable construction and may be harmonized. The actual work being performed at the time of the injury determines its character and is the real test whether it is interstate or intrastate work. The State law must give way to the Federal statutes, but they are not necessarily antagonistic. It is a well-known custom that a railroad company at its pleasure uses foreign cars found upon its road, making compensation therefor, and that it is not required promptly to return home a car if it has use for it. For all practical purposes we may treat this car as that of the appellant company. It was in its possession, subject to its control and use at its will in its business, with no recognized obligation to send it home while it had use for it. We may assume that if the empty car was to go home at once it would not have been placed in the repair shop for the extensive repairs contemplated. It is true that after the car left the shop it was taken to Corinth and there loaded with paper for Cleveland. If the appellant had desired it might as well have been loaded with freight for Albany, Buffalo or any other intrastate point. There is nothing to indicate that at the time the car was taken to the shop there was an intention that its next trip should be an interstate one. Evidently there was no intention upon the subject. It was not known just when the repairs would be finished or what use the appellant would make of the car when it left the shop. The movement of the empty car from Eagle Bridge to Colonie and from Colonie to Corinth was not interstate commerce. The interstate trip from Pennsylvania to Maine and from Maine to Eagle Bridge had been finished; the interstate trip from Corinth to Cleveland had not been entered upon. We may assume that cars are loaded at Corinth mills daily for different destinations. The load for this car happened to be interstate freight. Apparently the loading was the first indication of an interstate trip. We need not consider what would be the result if this car, *en route* from Maine to Canada, had been stopped off at Colonie for repairs necessary to be made to enable it to get home.

This case is unlike *Pedersen v. Delaware, Lackawanna & Western Railroad* (229 U. S. 146). There the work was being performed upon a bridge which was used for interstate and intrastate commerce. Here the work was being performed in the appellant company's shop, where the employee is called upon to perform any work required. The mere fact that he was engaged upon an empty foreign car partly dismantled (used indiscriminately for intrastate and interstate commerce as occasion required) does not deprive him of the benefit of the laws his State had made for his protection. The shops and the tracks leading into them were not used at any time as an agency in interstate commerce as such. We need not inquire what rule would apply if the car had contained interstate freight in transit. If a home car of the appellant company, at the end of an interstate trip, in need of repair before again entering service, had been brought into the shops for repair, the repair would not be an act of interstate commerce merely because the first trip after the repairs happened to be an interstate service. The after service is immaterial; the question is as to the character of the car as it stood in the shop. We conclude that the determination of the Workmen's Compensation Commission should be affirmed.

All concurred. Award affirmed. *Parsons v. Delaware & Hudson Co.*, 167 App. Div. 536, May 5, 1915.

In another case, the Appellate Division, in affirming an award, has held that an employee of an interstate railroad, who was injured in the company's shop in New York State while repairing a car which was used in general traffic, both intrastate and interstate, was protected by the Workmen's Compensation Law. The opinion is as follows:

WOODWARD, J.: The Lehigh Valley Railroad Company, a corporation operating an interstate commerce railroad, appeals from an award of the Workmen's Compensation Commission. The only question here presented is whether the claimant, who was employed in the car shops of the railroad company in repairing car No. 67058, which car was used in the general traffic of the railroad, both intrastate and interstate, is within the purview of the laws of the State. The railroad company urges that he comes within the Federal Employers' Liability Act (35 U. S. Stat. at Large, 65, chap. 149, as amd. by 36 id. 291, chap. 143) covering injuries to employees engaged in interstate commerce, and is, therefore, excluded from the compensation provided by the laws of this State. We think the contention is not sound.

Section 21 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) provides that "In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary 1. That the claim comes within the provisions of this chapter," etc. There is no evidence here that this claim does not come within the provisions of the law, unless it be the affidavit of an employee of the railroad company that this particular car had been used in domestic and interstate commerce prior and subsequent to this accident. The car at the time of the accident was in the shop of the Lehigh Valley Railroad Company at East Buffalo for repairs. It was for the time withdrawn from transportation duty and was placed in the machine shop for repairs. This machine shop is maintained and operated within the State of New York. If this shop were used in the construction of new cars it would hardly be suggested that they were engaged in interstate commerce in such a manner as to take employees out of the protection of the laws of this State, and no reason suggests itself why this old car, undergoing repairs, was in any sense a part of interstate commerce, in the sense necessary to bring it within the various acts of the United States governing such commerce. We think the award was within the purview of the statute and should be affirmed.

Award unanimously affirmed; KELLOGG, J., not sitting. *Okrzess v. Lehigh Valley R. R. Co.*, 170 App. Div. 15, Nov. 10, 1915.

4. *If the railroad, through an intrastate carrier, occasionally carries interstate baggage, freight, passengers, cars, etc.*—Basing its decision on the Parsons case noted above, the Appellate Division later held that a railroad employee who was killed while uncoupling cars on a wholly intrastate train after it had arrived at its terminal was not engaged in interstate commerce, even



though the train had carried baggage destined for another State, and unanimously affirmed an award of the Workmen's Compensation Commission. The full text of the decision is as follows:

HOWARD, J.: This is a death claim. In some parts of the record William Fairchild, the deceased, is styled a brakeman, and in other places he is called a switchman. But whatever he may have been styled he was in the employ of the Pennsylvania Railroad Company at its terminal in New York city, and as such was, on August 25, 1914, attempting to uncouple two cars from a train when there was some sort of an explosion of electricity, which is not very well explained and is not material, and Fairchild was killed. The train which the deceased was breaking apart was a local Long Island train. It was train No. 423 and had just come in from Port Washington, L. I. None of the cars of the train ran outside the State, but two of the cars were afterward used that day to carry baggage which was transferred to them from New Jersey. The Pennsylvania Railroad Company had such arrangement with the Long Island Railroad Company that although the deceased worked exclusively shifting cars for the Long Island Railroad Company, he was paid by the Pennsylvania Railroad Company. Tickets are sold by the Long Island Railroad Company for points outside the State of New York and tickets purchased outside of the State are honored on that road; but there is no proof that train No. 423 carried any except local passengers. And, although the Commission has so found, there seems to be no proof that train No. 423 carried "baggage which was destined for another State." We must assume this to be a fact, however, for the Commission has so found and, under section 20 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), we cannot review its finding. (See, also, Laws of 1915, chap. 167, amdg. said § 20.) No train of the Long Island railroad ever goes outside the State.

The only point of importance made in this case is that the deceased was engaged in interstate commerce. It seems to us that this point is not well taken. The deceased, the railroad and the trains operated exclusively within this State. The Long Island railroad brought nothing into the State and carried nothing out of the State. Sometimes it carried interstate baggage and interstate passengers. This, perhaps, would be interstate traffic under the ruling in *Pacific Coast Ry. Co. v. United States* (173 Fed. Rep. 448). The Commission has found that the train which the deceased was breaking up did, in this instance, carry interstate baggage. Except for this finding there would be no question here. But assuming, as we must, that this is true, under our ruling in *Matter of Parsons v. D. & H. Co.* (167 App. Div. 536) the claimant may, nevertheless, recover. There we said: "The actual work being performed at the time of the injury determines its character and is the real test whether it is interstate or intrastate work." Therefore, even if train No. 423 had carried baggage on its trip just ended, destined for another State, that baggage had been unloaded before the accident, and, at the time of the accident, the deceased was breaking up the train of empty cars preparatory to the formation of a new train. If the actual work being performed at the time of the injury is the real test as to whether it was interstate, surely the work being performed by the deceased when he was

injured was not interstate for he was uncoupling empty cars on a local railroad, operating always exclusively within this State—a railroad having no interstate characteristic whatever, except when actually engaged in carrying interstate passengers, baggage or freight.

A question is raised as to the amount of the award, the appellant contending that no evidence was presented from which the Commission was authorized to find that the average weekly earnings of the deceased was twenty-four dollars and sixty-four cents. But there was very definite evidence as to the earnings of the deceased during the fourteen months preceding his death, and we must assume that the Commission did its duty and made the computation, which resulted in the sums awarded, according to law; and, at all events, the average weekly wage has been determined as a conclusion of fact and, where there is any evidence to support a conclusion of fact, section 20 forbids us to review.

The award should be affirmed. Award unanimously affirmed. *Fairchild v. Pennsylvania R. R. Co.*, 170 App. Div. 135, November 10, 1915.

5. *If the work is new construction work.*—The Appellate Division and the Court of Appeals (169 App. Div. 903, May, 1915; 216 N. Y. Rep. 653, October 19, 1915) have upheld without opinion an award of the Workmen's Compensation Commission for the death of a night watchman who was employed to guard tools and materials intended for use in the construction of a new railroad station and new tracks for a railroad operating in interstate commerce. During the night, while standing on one of the tracks already in use, he was struck by a passing train. The ruling of the commission was based in part upon the fact that the duties of the deceased were confined entirely to new construction work which had not at the time of the accident become an instrumentality of interstate commerce. The pertinent part of the Commission's ruling is as follows:

By THE COMMISSION: Upon the question of interstate commerce it is only necessary to call attention to the fact that the duties of the deceased were confined entirely to new construction work. It is well settled that employees engaged in the construction of a station or track which has not yet become an instrumentality of interstate commerce are not subject to the Federal Employer's Liability Act. *Pedersen v. D., L. & W. R. R. Co.*, 229 U. S. 146; *Jackson v. C., M. & St. P. R. R. Co.*, 210 Fed. Rep. 495.

The United States Supreme Court in the *Pedersen* case, *supra*, while holding that the Federal Employer's Liability Act applies to an employee repairing a bridge in actual use, stated: "Of course we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities of interstate commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such." Page 152.

In the Jackson case, *supra*, the plaintiff was injured while building a tunnel which was to be used by the defendant in the transportation of interstate commerce, as a cutoff shortening the defendant's present route. The court held that the case did not come within the Federal Employer's Liability Act, because the tunnel had not yet been used in interstate commerce.

It follows that the deceased was not engaged in interstate commerce and that section 114 of the Workmen's Compensation Law has no application to the facts in this case.

Award of compensation will be made accordingly. All concur. *White v. N. Y. Central & H. R. R. Co.*, S. D. R. vol. 2, p. 477, November 21, 1914.

6. *If the work consists in taking inventory of materials and supplies which have not yet been used in interstate commerce.*—A laborer in the engineering corps of one railroad was struck by a train of another railroad while he was crossing tracks to take a train to a certain point to measure some switch timbers and rails. He lost his right foot. The work was being done by order of the Interstate Commerce Commission. The Appellate Division upheld an award without opinion. *Waite v. Pennsylvania R. R. Co.*, S. D. R., vol. 3, p. 364; 172 App. Div. 914, January 5, 1916.

b. *Remedy for the injury exists also in admiralty.*—Even when a remedy for the injury exists also in admiralty the injured employee may have compensation. Early in its work the Workmen's Compensation Commission had occasion to consider the relations of the Workmen's Compensation Law to maritime law and admiralty jurisdiction. The question arose in connection with accidents to longshoremen. The steamship companies urged that, as to such accidents, admiralty law excluded operation of the Workmen's Compensation Law. The Commission, upon opinion of its counsel, held that admiralty law was not exclusive, S. D. R., vol. 1, p. 413, September 3, 1914.

In the case of an employee injured on board a steamship lying alongside a pier in the Hudson river, appeal from an award of the Workmen's Compensation Commission was taken successively to the Appellate Division and to the Court of Appeals. Both courts affirmed the award. The affirmation of the Appellate Division was without opinion, 167 App. Div. 945, March, 1915. The Court of Appeals, passing upon the relation of the Workmen's Compensation Law to admiralty law, held that the injured employee had two remedies, an action in admiralty in the Federal

District Court and presentation of a claim for compensation to the State Workmen's Compensation Commission. The Judiciary Code of the United States, in bestowing jurisdiction of admiralty and maritime civil causes upon the Federal District Courts, saves common law remedies to suitors. "The remedy provided by the Workmen's Compensation Act is a substitute for the common-law remedy," says the Court of Appeals. "It is no sense a proceeding *in rem* to enforce a maritime lien and may, therefore, exist concurrently with the remedy in admiralty. The state cannot interfere with the admiralty jurisdiction (*The Lottawanna supra; Workman v. New York City*, 179 U. S. 552), and if the act be valid, an injured employee may in certain cases have a choice of remedies, one under the act and another in admiralty, precisely as before he could choose between his common-law remedy and the right to proceed in admiralty." *Walker v. Clyde S. S. Co.*, 215 N. Y. 529, July 13, 1915.\*

c. *The injury is incidental to the hazardous employment.*—An accidental injury must "arise out of" the injured employee's duties. The principle is illustrated by the cases under the ten subtitles following. It is set forth above, p. 82, under the heading "Accidents to employees, while on duty, but not incidental to their employment." What is said there should be read in this connection. The cases there following may be compared with those here following for an understanding of the difference between incidentalness and nonincidentalness.

1. *The occupation is incidental.*—Even an employee whose work or occupation is merely accessory to a hazardous employment may have compensation. It is necessary only that the injured employee's work be contributory, resultant, adjunctive or supplemental. The Workmen's Compensation Law covers the particular hazardous business in its entirety. Such interpretation follows from the broad and liberal construction that the law demands. Thus, a stableman who does no driving at all is entitled to compensation when injured by a horse that he is handling, if his employer uses the horse to draw a vehicle for gain. The principle is established by the following decision of the Court of

\* The Walker case is given in full in connection with the constitutionality of the Workmen's Compensation Law, above, p. 29. For further consideration of the remedy in admiralty see above, p. 160.

Appeals, which has been supplemented by an amendment of L. 1916, ch. 622, inserting the words "principal business" in Workmen's Compensation Law, § 3, subd. 4:

CHASE, J.: The American Express Company is an unincorporated association, consisting of more than seven members, and is engaged in the express business in the city of New York and other places. In its business it operates wagons drawn by horses on streets and highways. It maintains a stable in said city, where its horses are kept, and at said stable the claimant on July 15, 1914, while employed by said company as a stableman and engaged in his work as such, took one of its horses out of a stall and as he did so the horse slipped and fell on him, causing injuries for which compensation has been allowed under the Workmen's Compensation Law. The only question involved on this appeal is whether the claimant was engaged in one of the hazardous employments enumerated in the Workmen's Compensation Law at the time of the injuries.

The Workmen's Compensation Law (Cons. Law, ch. 67; L. 1914, ch. 41) provides compensation payable for injuries sustained by employees engaged in specified hazardous employments. Among the employments so specified is "The operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules." (Section 2, group 41.)

It is conceded that the employees of the American Express Company while actually engaged in driving horses drawing express wagons are entitled to the benefit of the Workmen's Compensation Law. It is claimed, however, that the benefit of the Workmen's Compensation Law does not extend to injuries incurred by men employed in the care of the horses that are used for the purpose of drawing its wagons or other vehicles. Incidental to the operation on streets, highways or elsewhere, of wagons drawn by horses, is the attendance upon horses when attached to wagons but not actually moving with them; harnessing and attaching the horses to the wagons; removing them therefrom and placing them and the wagons in the stable, and providing care for and attendance upon the horses while therein. It is the *business of operating wagons* drawn by horses that is intended to be covered by the act and not the mere steering of a wagon or handling the reins while driving a horse attached to a wagon. If the appellant's claim be sustained in its entirety, its employees will not be entitled to recover for injuries sustained when a wagon is not moving, or at any time in connection with the employment other than when an employee is actually engaged in steering or operating the wagon or perhaps driving a horse attached to a wagon or vehicle. Such a construction would be narrow and restricted and not in accordance with the spirit of the act. The extent to which a person can be said to be employed in the business of operating an express wagon within the meaning of the act, can be better appreciated by assuming that one person is employed to care for a particular horse at the stable and in fastening him to the wagon, driving him when actually engaged in the delivery of express packages and in the return of the horse and wagon to the stable, placing them therein and providing the feed and care for such horse until he is used again to draw the wagon for the delivery of express packages. Such employment of a man

would in all its parts be fairly included in the operation on streets, highways or elsewhere of wagons or other vehicles drawn by horses or mules. It seems quite clear to us that the statute was intended to cover an employee so engaged and that the operation of the wagon includes such attendance upon and care of a horse as is necessary to constitute a practical business. An express wagon driver in all of the work of such driver, as such work is commonly understood, should be deemed included in and protected by the terms of the statute.

We do not see that a distinction should be made among the men employed in the practical business of operating express wagons even if part of the duties in such operation is required of one man and part of another. The stableman should be deemed within the act if the driver of an express wagon acting as his own stableman, would in all his work be included therein. The order of the Appellate Division should be affirmed, with costs. WILLARD BARTLETT, Ch. J., CUDDEBACK, CARDOZO, SEABURY and POUND, JJ., concur; COLLIN, J., concurs in result. Order affirmed. *Costello v. Taylor*, 217 N. Y. 179, February 1, 1916.

The Appellate Division affirmed without opinion an award of compensation to the foreman of a livery stable who met with an accident on his employer's premises: *Leslie v. O'Connor & Richman*, S. D. R., vol. 5, p. 383; 173 App. Div. 988, May 3, 1916. Both the Appellate Division and the Court of Appeals affirmed without opinion awards to watchmen connected with hazardous employments: *White v. N. Y. Central & H. R. R. Co.*, S. D. R., vol. 2, p. 477; 169 App. Div. 903; 216 N. Y. 653; *Sorge v. Aldebaran Co.*, S. D. R., vol. 3, p. 390; 171 App. Div. 959; 218 N. Y. Rep. 636.

2. *The work is incidental.*—Even an employee not at the moment of injury engaged strictly in his hazardous occupation may have compensation. Given the fact that he has an occupation hazardous under Workmen's Compensation Law, § 2, his occupations incidental thereto are to be regarded as hazardous. This, though they may not be hazardous when standing independent and alone. The decision in the Costello case, presented immediately above, incidentally upholds this principle and therefore appears to affirm several decisions of the Appellate Division that had previously upheld it. The Court of Appeals says in the Costello case:

" \* \* \* assuming that one person is employed to care for a particular horse at the stable and in fastening him to the wagon, driving him when actually engaged in the delivery of express packages and in the return of the

horse and wagon to the stable, placing them therein and providing the feed and care for such horse until he is used again to draw the wagon for the delivery of express packages. Such employment of a man would in all its parts be fairly included in the operation on streets, highways or elsewhere of wagons or other vehicles drawn by horses or mules. It seems quite clear to us that the statute was intended to cover an employee so engaged and that the operation of the wagon includes such attendance upon and care of a horse as is necessary to constitute a practical business. An express wagon driver in all of the work of such driver, as such work is commonly understood, should be deemed included in and protected by the terms of the statute."

The converse of the principle has been set forth under the heading, "Accidents to employees, while on duty, not incidental to their hazardous employment," above, p. 82. The principles of the precedents quoted in the Newman opinion there given are illuminating here. Part of the Gleisner opinion there given is *so apropos* here as to justify repetition.

"If an employee is hired for work falling exclusively or predominantly within one or more of the enumerated occupations (of Workmen's Compensation Law, § 2), his right to compensation for injury in the course of his employment cannot fairly be made to hinge on a finding that he was, at the moment of injury, engaged in an act clearly constituting the direct doing of work named in the act. The painter's right to compensation for injury sustained at his daily trade does not depend on a showing that he was at the moment applying a brush, mixing paints, or mounting a scaffold. If an employee's duties are exclusively or predominantly within an enumerated employment or employments, and he is injured while doing work fairly within the scope of the ordinary and accustomed fulfillment of such duties, he has a rightful claim, even though the particular act he was doing when mishap befell him would not, of and by itself, ordinarily be described by the use of phraseology contained in the statute or as the doing of work enumerated in the statute. To hold otherwise would defeat the fair purpose of the law, and make its operation hinge and its benefits depend on harsh, arbitrary and unworkable distinctions which would inevitably paralyze its practical workings." *Gleisner v. Gross & Herbener*, 170 App. Div. 41, November 10, 1915.

The principle of incidentalness has been upheld and illustrated in the thirteen court decisions following. In two of them, *Larsen v. Paine Drug Co.* and *Benton v. Fraser*, the Court of Appeals has recognized and approved it by opinion. In four of them, the Appellate Division has handed down favorable opinions and in six of them has approved the awards without opinion. The texts of the opinions are given in full.

In the earliest case, *Smith v. Price*, the court affirmed an award of death benefits on the ground that putting a horse in his stall is incidental to the operation of a truck. The decision is as follows:

KELLOGG, J.: The appellant Price was carrying on the "business of carting and dray work" at Cortland, N. Y. The intestate, his teamster, had operated the truck during the day, and about five o'clock in the afternoon returned to the stable and, in the course of his employment was putting his horse in the stall when it jumped, squeezed him against the side of the stall, causing his death. The Commission determined that the employee met his death in the course of his employment of operating the truck within the meaning of section 2, group 41, of the Workmen's Compensation Law, which provides: "§ 2. Application. Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments: \* \* \* Group 41. The operation, otherwise than on tracks, on streets, highways, or elsewhere, of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules."

The appellants contend that the intestate, while caring for his horse at the close of the day according to his employment, was not fairly within group 41. In other words, that he was not operating a truck or wagon drawn by horses at the time he received his injury.

This is too narrow a construction of the statute. The benefit of the act is not limited to the actual time that the horse is moving or that the employee is upon the truck. It covers every injury or death received in the course of the employment. The loading and unloading of his truck, hitching and unhitching his horse to the truck, feeding and caring for his horse, are a part of the employment of operating the truck and are fairly within the provisions of the law.

Section 3 of the act gives certain definitions which go far in enabling us to properly apply it. By subdivision 4 "'Employee' means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer," etc.

By subdivision 7, "'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom."

By section 95 the rates of premium in the State fund are based upon the payroll and the number of employees. The State fund as an insurer, or the insurance company which takes its place, has received pay for the risks of the employee during all the time when he is engaged in the service of the master and for which he is paid unless it appears that he was performing some extra service outside of his employment.

The employee cannot receive full protection, and the employer cannot have the protection he has paid for, unless the act is given a broad and liberal construction so as to carry out the evident legislative intent.

In *Matter of McQueeney v. Sutphen & Myer* (167 App. Div. 528), decided at this term of court, we have considered the protection which the State has assumed to furnish both to the employer and the employee. No good reason is suggested why the benefit of the act should be confined to the time when



the workman is actually operating his truck. Such a construction is opposed to the provision defining the employee which recognizes his employment as continuing after he has left the plant and while he continues in the course of his employment. Group 41 of section 2, when read with subdivision 1 of section 3 of the act, was evidently intended to apply to persons operating trucks or the other vehicles or appliances mentioned in the act, for profit, when operated otherwise than upon tracks. The provision is plain when we read group 1 of section 2, which includes the operation of all kinds of cars upon railways and inclined railways. The provisions of group 1 fairly cover all vehicles operated for profit upon tracks, and it is a fair inference that group 41 was intended to cover all vehicles operated for profit. The clause "otherwise than on tracks" was inserted in group 41 to distinguish that group clearly from group 1. The words "on streets, highways, or elsewhere" are evidently surplusage. While the expression is perhaps unfortunate, it was evidently intended to make certain that the group covered all cars and trucks except those operated upon tracks covered by group 1.

In *North Carolina R. R. Co. v. Zachary* (232 U. S. 248) the intestate, a fireman, after inspecting, oiling, firing and preparing his engine for starting on a trip from Selma to Spencer, N. C., left it to go to his boarding house, a short distance away. In the train prepared for him were interstate cars; the engine had not been attached to the train. While crossing the track en route to his boarding house he was run over and killed, and his estate maintained an action under the Federal Employers' Liability Act for his death. The fact that he had left his engine and was going to his boarding house when he met his death was deemed immaterial, the court saying: "There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

There is not much difficulty, therefore, in saying that the claimant was acting in the course of his employment when he met his death. It is immaterial that at the time of his injury he was not moving the truck; it was as much his duty to care for the horse as it was to drive the horse when it was attached to the truck. He received the injury in the course of his employment.

The award should be affirmed. All concurred. Award affirmed. *Smith v. Price*, 168 App. Div. 421, May 5, 1915.

In *Larsen v. Paine Drug Co.*, the Appellate Division and the Court of Appeals affirmed an award of death benefits on the ground that building a shelf may be incidental to the manufacture of drugs and chemicals. The Appellate Division said:

HOWARD, J.: The Commission has found as follows: "On the 16th day of December, 1914, the day when Kris Larsen received the injuries which resulted in his death, he resided at West Brighton, Monroe county, New York, and was employed as a porter, elevator man and general utility man by the Paine Drug Company, a corporation doing business of manufacturing and selling drugs and chemicals and medicines and pharmaceutical preparations, at both retail and wholesale, in the city of Rochester, New York."

The evidence on which the Commission based this finding of fact is the affidavit of the secretary of the employer in which he states that the character of the Paine Drug Company was "retail and wholesale drugs and physicians' supplies." The employer being a wholesale druggist, it might reasonably be inferred that the concern was engaged in the "manufacture of drugs and chemicals" (Workmen's Compensation Law [Consol Laws, chap. 67; Laws of 1914, chap. 41], § 2, group 28); for a *drug*, according to Webster, is "Any substance used as a medicine;" and it may be assumed that a wholesale druggist compounds and mixes different substances together into medicines, and thus manufactures drugs. The Commission did undoubtedly so assume; but in the absence of substantial evidence to the contrary, section 21 of the act commanded the Commission and commands us to presume "that the claim comes within the provisions of this chapter."

The Commission has found that at the time of the accident the deceased "was engaged in building a shelf near the elevator well, and while reaching into the elevator well to obtain a board which he had placed some place on the side of the well, he lost his balance and fell down the elevator shaft from the third floor to the basement, by reason of which he was instantly killed." A general utility man engaged in an establishment where drugs and chemicals are manufactured must be presumed to participate more or less in the work of the establishment. The deceased was engaged at the instant of the accident in building a shelf, but in order to do this it may have been necessary to handle the drugs and chemicals in the building; that is, move them so as to have room to build the shelf and after it was built to place them upon the shelf. In fact the evidence before the Commission shows that the deceased was required to rearrange cases and do work of that character. In *Matter of McQueeney v. Sutphen & Myer* (167 App. Div. 528) this court said: "If the employee is engaged in an employment declared hazardous by this law, but at times may work in a non-hazardous employment, it is not unreasonable that the injury should be considered within the act if the employer fails to show all the facts. \* \* \* If the employer had insured in the State fund, the insurance premium would rest upon the basis that when at work for his employer the claimant McQueeney was to be engaged in the hazardous business all the while, and the premium having been exacted upon that basis *prima facie* the loss should be met upon that basis."

We think it should be held that the claimant's intestate came to his death while engaged in one of the hazardous employments enumerated in the act, and that the award of the Commission should be affirmed.

All concurred, except SMITH, P. J., and WOODWARD, J., dissenting. Award affirmed. *Larsen v. Paine Drug Co.*, 169 App. Div. 838, November 10, 1915.

The Court of Appeals affirmed the order of the Appellate Division in the *Larsen* case, saying:

"Where, as in this case, an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed."

The full decision, which deals also with the question of presumptive evidence, is as follows:

HISCOCK, J.: An award of compensation has been made and affirmed in this proceeding on the ground that plaintiff's husband was killed as the result of an accident arising out of and in the course of his employment by the appellant Paine Drug Company, while said employer was engaged in the hazardous business of manufacturing drugs and chemicals as defined in group 28 of section 2 of the Workmen's Compensation Law. The only evidence concerning the business in which the employer was engaged is found in its first notice of injury wherein, in answer to the question, "Business, goods produced, work done or kind of freight or transportation," it is written "drugs and chemical supplies," and in the proof of death furnished by the affidavit of the employer wherein it is stated that the name of the employer was the Paine Drug Company, and that the kind and character of the business conducted by it was "retail and wholesale drugs and physicians' supplies."

The evidence in relation to the general duties of the deceased was to the effect that he was employed in the capacity of "porter, elevator and handy man," and that his work "consisted of the ordinary work of a porter and elevator man; he took in our freight and packed all goods to be sent out by freight or express; drew acids; did carpenter work and various small repairs, and in fact all the various and varied work that an unusually intelligent and reliable handy man could do about a store like ours."

On this evidence and some unquestioned statements disclosing the particular work being performed when the accident occurred and upholding the finding in that respect, the commission found that said corporation was engaged in the business "of manufacturing and selling drugs and chemicals and medicines and pharmaceutical preparations at both retail and wholesale," and that while the deceased "was engaged in building a shelf near the elevator well (in the employer's place of business) and while reaching into the elevator well to obtain a board which he had placed some place on the side of the well, he lost his balance and fell down the elevator shaft \* \* \* by reason of which he was instantly killed."

It is now urged that it did not appear, *first*, that the employer was carrying on the hazardous business indicated in group 28, or, *second*, that the deceased at the time of his death was engaged in any work in the course of or connected with such hazardous employment even though said business was carried on by the employer.

It may be assumed that the statements made by the employer and taken into account in making the finding that it was engaged in carrying on the hazardous business in question are not conclusive. It is possible that if the Commission had been compelled to base a finding solely on said statements it would not have been strictly justified in drawing the conclusion that the employer was doing anything more than conducting a store for the wholesale and retail sale of drugs and chemicals. But the statute declares that there shall be a presumption that such a claim as this comes within the provisions of the statute "in the absence of substantial evidence to the contrary." (§ 21.) Without attempting to determine just how broad an interpretation should be given to this provision in respect of all questions which might arise in the course of such a claim as this, it is clear that it should

be construed as compelling the Commission and ourselves to presume in this case that the business conducted by the employer was within the provisions of the statute defining hazardous employments in the absence of some substantial evidence to the contrary. We do not think that any such substantial evidence overturning this presumption was furnished by the appellants. The business described in the statements before the Commission certainly approached very closely to the business of manufacturing drugs and chemicals, and if it was not the fact that such manufacturing was carried on, it would have been very simple, and we think it was necessary, to show affirmatively that the business did not include such feature. This was not done and the commission was entitled to draw the conclusion which it did.

Appellants' second proposition means that a person engaged generally in an employment which has been defined as hazardous cannot recover compensation for injuries received while performing some act not immediately connected with what might be deemed the hazardous and characteristic feature of the business, although such act was incidental to the employment and necessary in prosecuting and carrying forward the business. To illustrate, in the present case it means that no award can be made because the employee was injured while building a shelf for use in the business rather than engaged in the immediate process of manufacturing drugs and chemicals, although such shelf was entirely necessary in the prosecution of the business.

We think this is too narrow a view of the statute and would lead to limitations upon its application which were not intended or anticipated by the legislature. It is not necessary to attempt to lay down a final and universal rule on that subject. We feel perfectly secure, however, in holding that where, as in this case, an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed. The order should be affirmed, with costs. WILLARD BARTLETT, Ch. J., COLLIN, CUDDERBACK, HOGAN, SEABURY and POUND, JJ., concur. Order affirmed. *Larsen v. Paine Drug Co.*, 218 N. Y. 252, May 12, 1916.

In *Hendricks v. Seeman Bros.* the Appellate Division affirmed an award of death benefits on the ground that chasing mischievous boys was incidental to Hendricks' work as helper on an automobile truck, which in turn was incidental to the driving of the truck. The court said:

HOWARD, J.: The deceased was a "helper" on an automobile truck used as a delivery wagon by his employers who were wholesale grocers. While the vehicle was proceeding along Broadway in New York city some boys were hanging on the rear of the truck. The deceased ordered the boys to get off, but they refused to do so, whereupon he jumped off the truck to drive them away, and in doing so fell upon the pavement, fractured his skull and death resulted.

Under group 41 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), the operation of a truck on a highway is a hazardous employment for which compensation may be awarded in case of an accident which results in injuries. It is conceded by the appellant that the operation of the vehicle in question comes within the language of group 41, but it is contended that the helper on such a truck is not one who operates the truck. If the word "operation" is to be restricted to the actual process of driving the truck, that is, steering it and manipulating the brakes and levers, then, of course, the deceased was not engaged in the operation of this truck. But no such narrow construction should be placed upon the expression "operation \* \* \* of \* \* \* trucks." In order to operate this truck used in the wholesale grocery business, the proprietors of the concern found it necessary to employ two men. There were other duties required of these men beyond the mere matter of driving the truck. Presumably goods were to be loaded and unloaded and delivered; and in driving through the streets of the city it was thought necessary by the employers, very likely, to have one person guard and look after the load to prevent articles being lost or stolen, while the other person was driving the truck. All these various labors made up the duties of the men and constituted the operation of the truck. Therefore, it must be held that the deceased was engaged in the operation of the vehicle.

And we think his injuries arose out of and in the course of his employment. (See § 10.) It was undoubtedly a part of his duty to protect the load and drive away meddlesome persons and mischievous boys. Certainly his injury arose "out of" the fact that he was employed on the truck and it may be fairly said it arose "in the course of" his duty to keep these troublesome boys from doing damage to his employers' wagon and goods. In attempting to perform this duty he was fatally injured. That he was impetuous and imprudent, if such be the fact, bears not at all upon the question before us. The English cases cited by the appellants are not sufficiently parallel with the case at bar to serve as a guide to us here.

The Commission has found as a fact that the mother and brother of the deceased were dependent on him for support at the time of his death. We believe the evidence fairly warranted this finding; but, in any event, under section 20 of the act, when there is any evidence, the decision of the Commission is final and this court is not authorized to review. (See, also Laws of 1915, chap. 167, amdg. said § 20.) The award should be affirmed. Award unanimously affirmed. *Hendricks v. Seeman Bros.*, 170 App. Div. 133, November 15, 1915.

In *Miller v. Taylor*, the Appellate Division affirmed an award of death benefits on the ground that delivering a package is incidental to operating a truck. The court said:

LYON, J.: The single question involved upon this appeal is whether the accidental injury causing the death of deceased arose out of his employment.

The American Express Company was engaged in a general express business. The deceased was the driver of one of its motor trucks at Buffalo, N. Y. Prior to that he was the driver of one of its wagons. On December 2, 1915,

while crossing a street on his way from his truck to deliver an express package he was struck by an automobile and received injuries which caused his death two days later.

Concededly the injuries were received by the deceased in the course of his employment. The defendant contends, however, that the injuries did not arise out of the employment and cites in its brief as justifying such defense the cases of *Newman v. Newman*, 218 N. Y. 325; *Matter of Moore v. Lehigh Valley R. R. Co.* (169 App. Div. 177; *affd.* 217 N. Y. 627), and *Matter of Costello v. Taylor* (*Id.* 179).

In the *Newman* case the deceased had put up his horse and wagon several hours before receiving the injury and was making the delivery on foot entirely independently of the use of his horse and wagon and not as an incident of the operation on the street of a vehicle as in the case at bar, and, hence, was not engaged in one of the hazardous employments specified in the Workmen's Compensation Law. (Consol. Laws, chap. 67; Laws of 1914, chap. 41.) The *Moore* case is cited expressly as authority for the undisputed proposition that the injuries must have arisen both out of and in the course of the employment. The *Costello* case is sought to be distinguished from the case at bar and to be considered an authority for reversal as holding that it is the business of the care and operation of the horse and wagon which is considered hazardous and not the employment of a deliveryman especially when he is delivering on foot. While the question at issue here was not involved in that case, that decision expressly holds that the business of operating vehicles was intended to be covered by the act. The act of deceased in leaving his vehicle and delivering the express package on foot was a necessary incident of the operation of the vehicle as an express delivery car and so doing was within the scope of his employment. In the recent case of *Matter of Dale v. Saunders Bros.* (218 N. Y. 59) Judge Pound, in citing the *Costello* case, said:

"The duties of a teamster properly include the loading of his wagon, and are not limited to the driving of the team."

I think the award was clearly right and should be affirmed. Award unanimously affirmed. *Miller v. Taylor*, 173 App. Div. 865, June 30, 1916.

In *Glatzel v. Stumpp* the Appellate Division, by decision without opinion, June 30, 1916, affirmed an award of death benefits on the ground that adjusting a window box for a customer is incidental to driving a florist's wagon. The pertinent part of the Commission's ruling is as follows:

By the Commission.—On November 8, 1915, the day when Franz Glatzel received his injuries which resulted in his death, he resided at Fifth street, Mamaroneck, N. Y., and was employed as a driver of a wagon by G. E. M. Stumpp who was engaged in the florist business with a place of business at No. 761 Fifth avenue, New York city. The duties of Franz Glatzel were to drive the wagon, and if necessary to assist in delivering goods, such assistance to be rendered to a man who went on the wagon for the purpose of making deliveries.

On said date said Glatzel drove his employer's wagon to No. 4 East Sixty-fourth street, borough of Manhattan, city of New York, where some flowers

were to be delivered. Arriving at that place, the other man on the wagon delivered the flowers and Glatel and the other man proceeded to adjust a window box in the house. For this purpose Glatel got up on a ladder in front of the house, and while he was working at this, he lost his balance and fell into the front of the areaway, and the window box fell on top of him, causing a compound fracture of left thumb, and lacerations of the same. On or about November seventeenth, the wound showed evidences of infection, and tetanus developed and on November 24, 1915, Franz Glatel died from tetanus which had developed as a result of his injury. The work of assisting and delivering goods was incidental to the operation of the vehicle. *Glatel v. Stumpp*, S. D. R., vol. 6, p. 397, December 29, 1915.\*

In *Berliner v. Ritchie & Cornell* the Appellate Division, by decision without opinion, January 5, 1916, affirmed an award of compensation to an inside salesman and stock-keeper on the ground that looking at the ticket on a piece of cloth is incidental to making clothes. The pertinent part of the Commission's ruling is as follows:

1. On May 5, 1915, the day when Charles Berliner received his injuries, he resided at 143 West One Hundred and Forty-second street, New York city, and was employed as a salesman, stock-keeper, window dresser and a measurer of customers for clothing to be manufactured by Ritchie & Cornell, who conducted the business of tailors at 149 West Thirty-eighth street, New York city.

2. On said date when Charles Berliner was working for his employer at his employer's premises and was on a step ladder looking at the ticket on a piece of cloth which was to be used in the making of a suit of clothes, the ladder gave away, causing him to fall, as a result of which he fractured his left ankle, causing a rupture of the ligaments of the same, by reason of which injury he was disabled from working from the date of the said accident to July 13, 1915. *Berliner v. Ritchie & Cornell*, S. D. R., vol. 4, p. 446, July 12, 1915; 172 App. Div. 913, Jan. 5, 1916.

In *Benton v. Fraser* the Appellate Division, by decision without opinion, January 5, 1916, affirmed an award of compensation to an outside salesman on the ground that inspection of machinery installed in a customer's plant is incidental to manufacture of the machinery. (S. D. R., vol. 5, p. 392; 172 App. Div. 913.) The Court of Appeals affirmed the award in the following opinion:

WILLARD BARTLETT, Ch. J.: The respondent, when injured, was employed as a salesman by George H. Fraser of Brooklyn, who was there engaged in the business of manufacturing and selling machinery. Such is the finding of the state industrial commission. The term "salesman," however, is not accurately descriptive of the whole of his duties, for the commission has found further

\*The Glatel award was reversed by the Court of Appeals, January 30, 1917.

that "as a salesman his duties were to inspect the machinery at the plant. \* \* \* It was customary for him, while going the rounds of the different manufacturing plants soliciting orders to inspect the machinery already installed and listen to any complaints or suggestions which might be made by the persons who were using machinery which had been bought from George H. Fraser, his employer." In other words, he was an inspector as well as a seller of machinery.

The manufacture of machinery is classified as a hazardous employment under group 21 in the Workmen's Compensation Law. It may well be that a salesman employed by a manufacturer of machinery simply and solely to sell his products, and who never had anything to do with the machinery in operation or the process of manufacture, would not be entitled to the benefits of the act; but when such an employee performs functions which bring him into direct contact with the machinery itself, even when in operation, he may be as much exposed to danger as any workman, and I think his case falls within the letter and spirit of the statute.

The respondent was sent by his employer to the plant of the Atlas Portland Cement Company (to which he had sold some machinery) at Northampton, Pa., "and while he was present at a demonstration of the operation of that machinery," a piece of it fell upon his foot and occasioned injuries which required the amputation of a portion of the great toe. The state industrial commission has awarded him compensation at the rate of \$15 a week for thirty-eight weeks, on the ground that this injury arose out of and in the course of his employment. We are asked to reverse this award because (1) the respondent was not engaged in a hazardous employment; and (2) because he was not engaged in any hazardous work at the time of the accident.

I think neither of these objections to the decision of the commission is well taken. The manufacture of machinery is declared to be a hazardous employment by the express language of the Workmen's Compensation Act itself; and an employee of a person engaged in such manufacture whose duty it is to inspect the machinery which he has sold and who customarily does so after it is put in place at the different plants where it has been installed, is engaged in the hazardous employment of his master. That the work actually was hazardous in the present instance would seem to be sufficiently indicated by the occurrence of the accident.

Our attention is called to *Matter of Wilson v. Dorfinger & Sons* (218 N. Y. 84), in which it was held that the business of selling glassware, carried on by the firm against which the claim was made, was not included in group 20 of the Workmen's Compensation Law, which covers the manufacture of glass, glass products, glassware, porcelain and pottery. That case, however, involved no such question as that presented here, which is whether a salesman employed by a manufacturer of machinery whose duties require him to inspect it generally and who does inspect it after it is set up and in operation, may not be regarded as employed in the manufacture of machinery, one of the employments pronounced hazardous by the statute. In the *Wilson* case, the selling of glassware was an independent business, wholly separated from the manufacture of the product.

I advise the affirmance of the order appealed from, with costs. HISCOCK, CHASE, COLLIN, CUDDEBACK, HOGAN and CARDOZO, JJ., concur. Order affirmed. *Benton v. Fraser*, 219 N. Y. 210, October 31, 1916.



In *Praino v. Peloso*, 171 App. Div. 963, November 11, 1915, the Appellate Division, by decision without opinion, affirmed an award of compensation to a janitor, on the ground that chopping wood may be incidental to the operation of a boiler. Basing its ruling upon this decision, the Commission, in *Kiernan v. Schermerhorn Estate*, S. D. R., vol. 8, p. 483, May 3, 1916, has awarded death benefits to the widow of a janitor mortally hurt by a fall, on the ground that removing ashes from a cellar may be incidental to the operation of a boiler.

Moving a piano is incidental to the manufacture of pianos: *Mooney v. Weber Piano Co.*, S. D. R., vol. 5, p. 396, August 11, 1915; 172 App. Div. 917, January 18, 1916; and unloading beef to meat packing: *Meyer v. Morris & Co.*, S. D. R., vol. 6, p. 339, November 29, 1915; 173 App. Div. 990, May 18, 1916; — N. Y. —, December 12, 1916. The Appellate Division affirmed these two awards without opinion. The Court of Appeals affirmed the Meyer award without opinion.

3. *The employee is injured while coming to, or leaving work.*— Even when an employee is injured while coming to, or leaving work, he may have compensation. Under the heading, "Injuries of employees during absence from duty," p. 74, above, the question just where and when an employee's employment ceases or begins as he quits work at night or comes to work in the morning has already been considered in the light of cases denying awards. A number of court and commission cases illustrating the making of awards under such circumstances are noticed here.

A subway shorer who had reported late and had been suspended by his boss fell from a footpath and was killed while leaving the work and going to an exit. The Appellate Division upheld a compensation award with the following opinion:

KELLOGG, P. J.: The deceased had been in the employ of the employer appellant for about eight months, receiving three dollars and sixty-eight cents per day, payable weekly. On Monday, April 27, 1915, he worked as usual. Upon appearing for work in the subway Tuesday morning, dressed in his overalls, he was a little late and the superintendent told him he need not work. He excused him from work, not because he was late, but because he felt that he had been drinking some and was not in a fit condition to engage in the dangerous kind of work which he had been doing. He started to leave the subway and tripped and fell, receiving the injury complained of. The appeal proceeds upon the theory that he was not a regular employee, but was there asking for work, which was refused, and that he was not,

99 Tex. 547; *Elliott v. Rea*, 6 W. C. C. 27; *Zabriskie v. Erie R. Co.*, 85 N. J. L. 157.) Her being there was reasonably incidental to and within the scope of her employment. It was in the interest of her employer as well as of herself that she should be able to continue her work without physical inconvenience.

Had an accidental injury resulted from the condition of the room, or of the toilet appliances, the injury might properly have been held to have arisen out of the employment. In fact, had there been a nail or a scissors blade imbedded in the wood and projecting from the side of the partition, which accidentally injured her eye as she turned to see what touched her, I think the injury would have been incidental to the use of the room for toilet purposes, and the claimant entitled to an award."

The Appellate Division unanimously and without opinion affirmed an award to the dependents of a subway laborer who lost his life by falling into a sewer while attending to a call of nature, *Cino v. Morton & Gorman Contracting Co.*, S. D. R., vol. 5, p. 387, August 3, 1915; 172 App. Div. 917, January 18, 1916. In a case affirmed by the Appellate Division, Sept. 13, 1916, a driver had stepped on a nail and died from lockjaw. It was thought that the accident might have occurred while he was attending a call of nature: The report to the Commission recommending an award to his widow cited precedents as follows:

Bradbury's Workmen's Compensation Law, page 410, writing on the case of *McLaughlin v. Anderson* (1911), 48 Scotch L. R. 349, 4 B. W. C. C. 376; the court applied the rule laid down by the lord chancellor in the case of *Moore v. Manchester Lines* (1910), A. C. 498, as follows: "I think an accident befalls a man in the course of his employment if it occurs while he is doing what a man so employed may reasonably do within the time during which he is employed and at a place where he may reasonably be during that time to do that thing."

It seems to me the lord chancellor might justly have prefixed to the clause, "in the course of his employment," the words, "arising out of," making it read, "arising out of and in the course of his employment."

The same work, page 451, cites the following case: "During the dinner hour a man met with an accident when returning from a place where he had gone to relieve nature, and it was held that the accident arose out of and in the course of his employment." *Elliott v. Rea*, (904) 6 W. C. C. 27. *Putnam v. Murray*, S. D. R., vol. 6, p. 355, December 6, 1915; S. D. R., vol. 7, p. 407, February 3, 1916; 174 App. Div. 720, September 13, 1916.

7. *The employee is injured while seeking shelter from storm.*—Even an employee seeking shelter from a storm at the time of his injury may have compensation. Ralph Raymond Moore, a line-man helping to relocate his employer's telegraph system, found

shelter from a rain storm under railroad cars on a siding. The cars, pushed by an engine, cut off his legs. The Workmen's Compensation Commission awarded him two-thirds of his weekly wages for life, S. D. R., vol. 2, p. 472, October 30, 1914. The Appellate Division and the Court of Appeals affirmed the award, the latter without opinion, 217 N. Y. 627, January 25, 1916. The Appellate Division said:

"Obtaining shelter from a violent storm in order that he might be able to resume work when the storm was over, was not only necessary to the preservation of the claimant's health and perhaps his life, but was incident to the claimant's work, and was an act promoting the business of the master."

The opinion in full is as follows:

LYON, J.: This is an appeal from an award under the Workmen's Compensation Law. The vital question involved is whether the injury sustained by the claimant arose out of his employment. The claimant was a lineman in the employ of the defendant, which owned and operated a steam railroad, and maintained a line of poles along its right of way from Jersey City, N. J., to Buffalo, N. Y., passing through the town of Le Roy, N. Y. These poles carried telegraph and telephone wires used by the appellant in its commercial business, and for the guidance, through its signal system, of its engineers operating interstate and intrastate trains; and also carried wires operated by the Western Union Telegraph Company under some arrangement with the defendant.

At North Le Roy, N. Y., the defendant's line of poles was located in such dangerous proximity to a switch, known as the Buffalo, Rochester and Pittsburg switch, that it was decided by the defendant to relocate the line at that point. For this purpose the defendant, at the time the claimant was injured, was erecting a new line of poles and wires upon the opposite side of its track, not disturbing the former line, which it intended to continue to use until the construction of the new line had been completed and connection made with it.

On July 23, 1914, prior to connection having been made with the new line, and while the claimant was working thereon, a violent rainstorm arose. It was not the custom of the defendant to furnish shelter for its linemen in the event of sudden storms, and there was no rule of the defendant as to what the men were to do in such contingency, but each man was supposed to find shelter wherever he could. The defendant was not accustomed to make any deductions in the wages of its linemen by reason of sudden storms interfering with the work, and the defendant made no such deduction upon this occasion. Claimant and several of the other workmen stood under a tree until it no longer furnished protection. Some of the men went into a paper mill near by. There being no more room there, and apparently no other available shelter, the defendant's foreman, the claimant, and two other of defendant's workmen found shelter under cars standing upon this switch, about a quarter of a mile from the place where they had been working. While there an engine of the Buffalo, Rochester and Pittsburg Railroad Company moved the cars

standing upon the switch, and the claimant, who was sitting with his arms folded, was struck upon the forehead by a projection of the car and fell over, and in some manner his legs came upon the track and were run over and cut off below the knees. The claimant had not been forbidden to seek shelter under cars, and there was no rule of the defendant to that effect. The Workmen's Compensation Commission awarded the claimant, in the absence of proof to the contrary, as for a permanent total disability, two-thirds of his weekly wages for the remainder of his life. Upon the hearing before the Commission the defendant contended that being an interstate railroad its employees did not come within the provisions of the Workmen's Compensation Law. The appellant has taken this appeal from the award, basing its claim of right to reversal upon the grounds that the Workmen's Compensation Law is unconstitutional, in that it contravenes the provisions of the Fourteenth Amendment of the Federal Constitution; that at the time of receiving the injury the claimant was engaged in interstate commerce, and that Congress, in passing the Safety Appliance Acts, Hours of Service and Employers' Liability Acts, had fully legislated with reference to the subject of interstate commerce, to the exclusion of all State legislation; that the State Compensation Commission was without authority to make an award for the reason that the claimant was not engaged in State commerce at the time of receiving his injury within the provisions of section 114 of the Workmen's Compensation Law; and also upon the ground that the injury to claimant did not arise out of and in the course of his employment.

In the case of *Matter of Jensen v. Southern Pacific Co.* (167 App. Div. 945), and in the cases of *Matter of Burns v. Southern Pacific Co.* (Id.) and *Matter of Walker v. Clyde Steamship Co.* (Id.), argued therewith, decided by us at the March term, now before the Court of Appeals, we held the Workmen's Compensation Law to be constitutional; and in the case of *Matter of Winsfeld v. N. Y. C. & H. R. R. Co.* (168 App. Div. 351), decided by us by a divided court at the May term, we held that the claimant although engaged in interstate commerce was not excluded by section 114 of the Workmen's Compensation Law from claiming benefits under that law, where the injury was in no way attributable to the negligence of the employer but was as to it wholly accidental.

In view of these decisions the questions involved therein are no longer open ones in this court, and the only question which need now be considered is whether the injury sustained by the claimant arose out of and in the course of his employment, within the intent of the act. Section 10 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1913, chap. 816, as re-enacted and amd. by Laws of 1914, chap. 41) provides that "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an *accidental personal injury sustained by the employee arising out of and in the course of his employment*, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty." The construction of telegraph and telephone lines

was one of the employments covered by the Workmen's Compensation Law. Concededly, the injury to the claimant was not occasioned by his willful intention or intoxication, and was accidental within the meaning of the statute.

The House of Lords defined the meaning of "personal injury by accident" in the English Workmen's Compensation Act, 1897 (60 & 61 Vict., chap. 37, § 1) as "an unlooked for mishap or an untoward event which is not expected or designed." (*Fenton v. Thorley & Co. Ltd.*, L. R. [1903] A. C. 443; 5 W. C. C. 1.) The meaning of the word "accident" as contained in the New Jersey Compensation Act, which is there known as the Employers' Liability Act (Laws of 1911, chap. 95), is an unlooked for and untoward event which is not expected or designed. (*Bryant v. Fissell*, 84 N. J. Law, 72, 76.) The United States Supreme Court has defined the term "accidental," as used in an accidental insurance policy, as used "in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected;'" \* \* \* if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but \* \* \* if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means." (*Mutual Accident Assn. v. Barry*, 131 U. S. 100, 121.)

The use of the conjunctive in the section above quoted indicates that the accidental injury must both arise out of and in the course of the employment. An accidental injury sustained during the course of the employment, but not arising out of the employment, as well as such an injury arising out of the employment, but not sustained during the course of the employment does not fall within the provisions of the Workmen's Compensation Law. That the injury was sustained by claimant during the course, that is, the period, or time or extent of the employment, is not seriously disputed by the defendant; but the defendant strenuously contends that the injury did not arise out of the employment. That the injuries occurred during working hours which were continuous; that it was customary for defendant's linemen to cease work and obtain shelter during sudden storms, and that no deduction was made from the ordinary daily wages paid the workmen by reason thereof is conceded. It was not only customary that the claimant should seek shelter from the storm, but doing so was not a remote, but a necessary and unquestionably frequent incident of his employment during the summer months. Had he taken shelter in the paper mill and the roof fallen in, or the floor given way, and he been accidentally injured, he would have been entitled to the benefit of the Workmen's Compensation Law. Whether a place in a stone crusher being operated by machinery, or under a car standing upon a switch, was the safer place, does not appear. The four linemen chose places under the cars. However, assuming that the place under the car was the more dangerous, the fact that the plaintiff's judgment led him to choose it and that he was injured there does not bar him from the operation of the act. Contributory negligence furnishes no ground of defense. The Workmen's Compensation Law says that the employer shall provide compensation "without regard to fault as a cause of such injury." The risk of accidental injury was incidental to the claimant seeking and obtaining shelter,

and to his employment, and was fairly within the contemplation of both employer and employee. The act of seeking and obtaining shelter arose out of, that is, was within the scope or the sphere of his employment, and was a necessary adjunct and an incident to his engaging in and continuing such employment. The language "arising out of and in the course of the employment" is also used in the English act (*supra*), and we may, therefore, properly examine the decisions of the courts of that country for their views as to the construction of this language as applied to cases more or less similar to the case before us. (See, also, English Workmen's Compensation Act, 1906 [6 Edw. 7, chap. 58], § 1.) Where by an arrangement between a railway company and certain employees they were allowed to go to a cabin on the railway company's premises for certain meals, and one of such employees was returning from the cabin after having a meal there, and was knocked down by a car which was being shunted on one of the company's tracks, it was held that the injury arose out of and in the course of the employment. (*Earnshaw v. Lancashire & Yorkshire Ry. Co.*, 115 L. T. Jour. 89; 5 W. C. C. 28.)

A night watchman who left his box and went into a shanty, where tools were kept, to cook and to eat his food, and was injured by the falling of the shanty, was held to have been injured by accident arising out and in the course of his employment. (*Morris v. Lambeth Borough Council*, [1905] 22 T. L. Rep. 22; 8 W. C. C. 1. See 1 Brad. W. C. L. [2d ed.] 448.)

A bricklayer, who was paid according to the number of hours he worked, remained in the building during the noon hour, although the workmen employed on the building usually went away, and sat down under a wall to eat his dinner. The wall fell while he was sitting there and injured him. The county judge was of the opinion that as he had sat down merely for the purpose of eating his dinner, the accident could not be said to have arisen out of and in the course of the employment. The Court of Appeal held that the time of employment covered all his movements within the ambit of the premises where he was employed which were ancillary to the work which he had to do; and that the court should take a broader view and treat him as still in the employment. COLLINS, M. R., said: "It was to the interest of the respondent that he should eat the necessary food to enable him to do his work, and he was allowed as part of the terms of employment to stay on the premises during the dinner hour and eat his dinner there. We cannot say that it is an inference of law that, because he was eating his dinner, and was not paid wages in respect of the dinner hour, he ceased to be in the respondent's employ. I think that the accident here arose out of and in the course of the employment." All the other judges concurred in that conclusion. (*Blouett v. Sawyer*, 6 W. C. C. 16; L. R. [1904] 1 K. B. 271; 89 L. T. Rep. 658.)

A lighterman while waiting for the tide to ebb sufficiently to allow him to go to work to pump out a barge, went to a small boat about fifty yards from the barge to rest, and in trying to get into the boat was injured. It was held by the Court of Appeal that his injury arose out of and in the course of his employment. (*May v. Ison*, 7 B. W. C. C. 148; 110 L. T. Rep. 525.)

A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service. (*Pope v. Hill's Plymouth Co.*, 102 L. T. Rep. 632, and on appeal, 1912, 105 id. 678.)

Of cases other than those of the English courts the following are more or less in point: In the case of *North Carolina R. R. Co. v. Zachary* (232 U. S. 248) it was held that where a locomotive fireman who had prepared his engine for a trip had left it to go to his boarding house a short distance away, and was run over and killed while crossing a track *en route* to his house, he was then in the employ of the company. The court said: "There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

Where a railroad employee in crossing the tracks at a public crossing to reach a toilet, was struck by an automobile and thrown upon the tracks, where he was subsequently struck by one of the defendant's trains, the accident was one "arising out of and in the course of his employment" within the meaning of the New Jersey Employers' Liability Act (*supra*) for the resulting fatal injury. *Zabriskie v. Erie R. R. Co.*, 85 N. J. Law, 157.)

An injury sustained by a workman who is employed by the week to work in a room leased to his employer, in the building owned by the lessor, when the workman on his way to lunch, at the noon hour, has left the workroom and is descending the stairway, which is in control of the owner of the building, but which the employer and his employees have the right to use as the only means available for going to and from the workman's place of employment, can be said to have arisen out of and in the course of his employment within the meaning of the Massachusetts Workmen's Compensation Act. (Acts of 1911, chap. 751; *Matter of Sundine*, 218 Mass. 1.)

We have carefully examined the cases cited by the defendant, and so far as the facts in any of such cases are at all similar to those in the case at bar, the claimant when injured was doing an act, or was at a place which his employer had expressly forbidden. Thus, in the case of *Parker v. Hambrook* (5 B. W. C. C. 608) before the Court of Appeal in July, 1912, and which is referred to in the defendant's brief as a case that closely resembles the case at bar, the head note, which correctly states the substance of the decision, reads: "A workman was employed to get flints on the surface or just below the surface of a quarry. He was expressly forbidden to go into a trench eleven feet deep. The workman was paid according to the number of flints dug out. To take shelter from the rain, and to get more flints he went into the trench and was smothered by a fall of earth. Held, the accident did not arise out of and in the course of the employment." The defendant also cites the case of *Weighill v. South Heaton Coal Co.* (4 B. W. C. C. 141) before the Court of Appeal in March, 1911, where a collier in a coal mine was ordered to cut the coal in the colliery. He left his work and went to cut coal in a part of the mine where it was forbidden by special rule to cut any. He thereby undermined some props and caused a fall which killed him. Held, that the accident did not arise out of and in the course of his employment.

However, in the case of *Harding v. Brynnddu Colliery Co. Ltd.* (L. R. [1911] 2 K. B. 747; 4 B. W. C. C. 269) the Court of Appeal, distinguishing the *Weighill* case, held that where a collier who had been set to drill a hole from above into a seam, in order to draw off gases and render safe the seam, which was marked off as forbidden, and was told that he must not

go into the seam to see if the drill was running straight, but nevertheless went and was suffocated, there was evidence to support the finding of the county judge that the accident arose out of and in the course of the employment, and that the appeal by the employers from the award should be dismissed.

In the case at bar the claimant violated no rule of his employer, did no forbidden act, accepted with the knowledge of defendant's foreman the only shelter available unless it might have been a place in the stone crusher which was being operated, to the noise of which he seems to attribute his failure to hear the moving locomotive. The defendant in its brief relating to this subject says: "If respondent, therefore, had gone under the cars to get a wire that had become entangled with the under side of the car, and while endeavoring to get it loose, was injured, his accident would have arisen out of his employment, because he would have been performing an act to promote the business of the master, and the accident would have been closely allied to or connected with the work of the employer." Obtaining shelter from a violent storm in order that he might be able to resume work when the storm was over, was not only necessary to the preservation of the claimant's health and perhaps his life, but was incident to the claimant's work, and was an act promoting the business of the master.

I have not taken up the question as to whether building the new line, with which connection had not been made at the time claimant was injured, and which had not yet become an instrumentality of commerce, was intrastate and not interstate as claimed by the respondent, as in the view we have taken in prior cases the question does not seem to be important. However, there may be cited as bearing on this question *Pedersen v. D., L. & W. Railroad* (229 U. S. 146) and *Shanks v. D., L. & W. R. R. Co.* (214 N. Y. 413, 420. See also dissenting opinion, *Id.* 425.)

That the purpose of the Workmen's Compensation Law was to make the risk of an accidental injury one of the industry itself, even when happening through the fault of the workman, treating it as an element in the cost of production to be added thereto, and hence borne by the community in general; and that the act should be construed liberally, and not strictly as a statute in derogation of the common law, and should receive as broad an interpretation as can fairly be given it, cannot be questioned. However, the purposes of the law have been most excellently stated by Mr. Justice WOODWARD in his opinion in *Matter of Rheinwald v. Builders' Brick & Supply Co.* (168 App. Div. 425), recently decided by this court, and further comment is needless.

I think that the injury to the claimant arose out of and in the course of his employment within the intent of the statute, and, hence, that the award of the Compensation Commission should be affirmed.

All concurred; SMITH, P. J., in result; KELLOGG, J., not sitting. Award affirmed. *Moore v. Lehigh Valley R. R. Co.*, 169 App. Div. 177, July 1, 1915.

8. *The injury consists in poisoning.*—An employee accidentally poisoned may have compensation when the poisoning arises out of his employment. Poisoning is an accident under certain circumstances, such as unconscious contact with a poisonous plant,



the taking of poison by mistake, the sudden bite of a poisonous reptile or insect, envelopment in poisonous fumes. The direct results of poisoning may be classed as infection or disease, though sources of definition are meagre upon the point. A section hand who was mowing a railroad right of way came in contact with poison ivy. The poisoning led to congestion of his lungs which resulted in his death. In affirmance of an award to his widow, the Appellate Division rendered the following opinion:

KELLOGG, J.: Plass was a section laborer and, as such, in the course of his employment was mowing the right of way of the appellant's railway. This was done every year and the men were engaged several days in performing that duty. The object in mowing the grass was for the safety of the bridges, the adjoining properties, to keep fires from spreading and to prevent the grass coming up on the tracks, thus causing the engines to slip. In the grass was growing poison ivy and other weeds, and while mowing Plass came in contact with the ivy and was poisoned, became sick and confined to his bed, resulting in blood poisoning, where he contracted congestion of the lungs from which he died August 29, 1914. The remote cause of his death was the ivy and septic poisoning and immediate cause of his death was acute congestion of the lungs, to which his poisoned condition predisposed him. Such are the findings of the Commission.

It has been held that contact with poison ivy which results in death is an accidental death within a policy covering death by external, violent and accidental means. (*Railway Mail Assn. v. Dent*, 213 Fed. Rep. 981.)

The injury cannot be called an occupational disease. Plass actually, inadvertently, came in physical contact with poison ivy. The poison to his system caused thereby resulted in his sickness and reduced his power of resistance and made him susceptible to bronchitis. The attending physician treated him for ivy poisoning and then found he had developed more or less infection, the blobs breaking open, and in that way he became infected and while in bed contracted bronchitis, which afterward developed œdema of the lungs and he died quite suddenly.

The Commission has found that the ivy and septic poisoning was the remote cause of his death and that his poisoned condition predisposed him to the acute congestion of the lungs of which he died. We are not at liberty to review the findings of the Commission upon a question of fact. There is certainly some evidence to warrant the finding.

The award is, therefore, affirmed. Award unanimously affirmed. *Plass v. Central New England Ry. Co.*, 169 App. Div. 826, Nov. 10, 1915.\*

9. *The injury is due to assault.*— Even when his injury is due to an assault an employee may have compensation. In January, 1915, the Workmen's Compensation Commission awarded compensation in three cases of assault. Two of these were carried to the Appellate Division and the Court of Appeals. The Appellate

\* Compare the case of taking poison by mistake for medicine presented above, p. 94.

Division has published decisions affirming the awards in the form of brief syllabi. The Court of Appeals dismissed the appeals. Therefore the opinions of the Workmen's Compensation Commission are the only recourse for the legal aspects of the cases. The first case was that of a policeman employed by a mining company. He was stabbed to death by a man whom he had arrested at the request of a co-employee. The employer and the state insurance fund raised several objections to award of compensation. The Commission's disposition of these is most clearly presented by its full opinion, as follows:

**BY THE COMMISSION.**—Claim for compensation is presented by Viola E. James on behalf of herself and two minor children, because of the death of William H. James, which occurred September 30, 1914. The employers are engaged in the business of mining magnetic iron ore at Mineville, Essex county, N. Y. William H. James was employed as a policeman. His wage was ninety dollars per month. The entire wage was paid by Witherbee-Sherman & Company, Inc., and one quarter was refunded by the Port Henry Iron Ore Company, James being a joint employee of both companies. As both are insured in the State Insurance Fund no question arises as between the two companies.

About one a. m. on September 30, 1914, James was requested over the telephone to come to shaft "A" of the mine of Witherbee-Sherman & Company, Inc. The telephone message came from the shaft but it does not appear who sent the message. James was told that one Ustin Zebrak, another employee of the company, was afraid to go to his home because one Tony Hydric was at the house and had threatened to kill him. James went to shaft "A", accompanied Zebrak to his home and there arrested Hydric. On the way to the police station, James was stabbed by Hydric, receiving injuries from which he died six hours later.

The employers and the representative of the State Insurance Fund object to the award of compensation upon the ground that James was not employed in a hazardous occupation as defined by section 2 of the law; that his death was not due to accidental injuries arising out of and in the course of such employment, and upon the further ground that the decedent was acting in the capacity of deputy sheriff and was to receive fees therefor from the town of Moriah (in which Mineville is located), or from the county of Essex.

It is important to know what the relations were between James and the employers. As already appears he was employed as a policeman. It was part of his duty to protect the property and the employees of the company and to maintain peace and order on the premises. Subsequent to his employment, and for the purpose of effectually carrying out his duties, he was appointed as a deputy sheriff of the county of Essex, by request of his employers. The community is a mining town and the company evidently thought it essential to the operation of its mines and the proper conduct of its business to have in its employ a policeman clothed with authority of law. In addition the company erected a jail which was subsequently presented to the town. James

was required to wear a uniform. He had no regular hours of duty and received no specific instructions from his employers as to the work to be performed by him. In addition to the wages received from his employers, he received fees from the town of Moriah or the county of Essex in connection with arrests and for his attendance in court. According to the statement of the attorney for the employers, the wages paid by such employers "were really compensation for the moral and deterrent effect of his presence as a peace officer."

Some of the objections to the allowance of this claim need but little consideration. We have no hesitation in holding that James was employed in a hazardous occupation within the meaning of section 2 of the Compensation Law. Constables and policemen are often employed by corporations in the same capacity as James. Where the trade, business or occupation of an employer is classified as hazardous all employees subject to the hazard of the work come within the provisions of the act. James was required to work on the premises and in the locality where the plant was situated, and we have universally held that employees whose duties require their presence at the plant are within the act, although not actually engaged in its physical operation.

That James met with an accident is equally plain. It has been frequently decided in cases practically identical, that an injury such as was received by James is an accidental injury. The following cases are cited as sufficient authority for this proposition: *Anderson v. Balfour*, 2 Ir. Rep. 497; *Nesbit v. Rayne*, 3 B. W. W. C. 507; *Kelly v. District School*, 136 L. T. J. 605.

The *Anderson* case holds that a gamekeeper is entitled to compensation for injuries sustained where he was shot by a poacher. In the *Nesbit* case it was held that a cashier who was shot by a stranger was entitled to compensation: and in the *Kelley* case, the House of Lords of England affirmed an award of compensation where the employee, a school master, was assaulted by his pupils. In all of these cases it was held that the injuries were accidental. It needs no further argument to hold that James met with an accident.

The principal objection made to the award is based upon the fact that James was acting in the capacity of a public officer and that the injuries which caused his death did not arise out of or in the course of his employment by the insured. Cases in which policemen and deputy sheriffs were in the employ of corporations have been frequently passed upon by the courts. It is only necessary to call attention to the case of *Sharpe v. Erie R. R. Co.*, 184 N. Y. 100.

In that case, an action was commenced against the railroad company to recover damages for the death of a boy who was shot and killed by one Wheeler, a special officer in the employ of the railroad company, who was also a deputy sheriff. The boy had been stealing a ride and had jumped from the train and ran to adjacent land. He was pursued by Wheeler and while both were upon the adjoining premises, Wheeler shot the boy, the ball entering the back of his head, producing death. The question at issue was stated by Judge O'Brien, as follows: "The question in this case is whether the defendant can be held responsible for the act of Wheeler in killing the boy. It is claimed that Wheeler acted in a dual capacity; that while he was the servant of the defendant for certain purposes he was also a public officer, and that he killed the boy while acting in the capacity of such officer and not as the servant of the defendant."

After reviewing the facts, the court stated the law as follows: "*A railroad company employing a servant who happens to be a public officer acquires no immunity from such employment. Constables and policemen are often employed by corporations in the same capacity as Wheeler was. It is not beyond the province of a jury in such a case to find that the official acts of the employee are to be used for the benefit of the defendant and in protection of its interests and property. And, hence, in such a case the character of the servant's act is to be determined in the same way and upon the same principles as if he was not a public officer at all. If he acts maliciously or in pursuit of some purpose of his own, the defendant is not bound by his conduct, but if, while acting within the general scope of his employment, he simply disregards his master's orders or exceeds his powers, the master will be responsible for his conduct.*"

It is apparent from the foregoing that the relationship of master and servant which existed between James and his employers was not altered by reason of the fact that James was also a deputy sheriff. The real point at issue in the case is whether or not James was acting within the scope of his employment. We think it apparent that his official acts were to be used for the benefit of the employers and for the protection of their interests and property. This being so the fact that he might have received a fee from the town or county for making the arrest in question is not material. Had he not been in their employ he would probably never have been appointed as a deputy sheriff. From the report of the accident filed by Witherbee-Sherman & Company, Inc., with the Commission on October 8, 1914, it would appear that James was actually stabbed on the premises of the company. He had no regular hours of employment and it was largely within his own discretion as to what acts he would perform in the discharge of his duties to his employers. Under these conditions and in view of all the facts we hold that he was acting within the general scope of his employment.

The further objection is made that James in making the arrest exceeded his authority even as a public officer. In this respect it is claimed that Hydric was arrested for a misdemeanor and that the arrest being made at night and without a warrant was illegal. Conceding that the arrest was for a misdemeanor (which was not established by any evidence in the case), the objection is not material as appears from the decision of the Court of Appeals in the Sharpe case, above quoted. The fact that James exceeded his powers did not change the relationship of master and servant which existed between himself and his employers.

The injury in question was received while James was doing the duty which he was employed to perform. Without further discussion it is sufficient to say that under such circumstances the injury arose in the course of his employment. The injury was a natural incident to the work which he was required to do for his employers and therefore arose out of the employment.

Award of compensation is made to the widow and two minor children accordingly.

All concur, except Commissioner DARLINGTON, who dissents. *James v. Witherbee-Sherman & Co.*, S. D. R., vol. 2, p. 483, Jan. 9, 1915.

The second case was that of a foreman attacked by two subordinates whom he reprimanded for poor work. The Commission's

opinion fully analyzes the definition of an "injury" in Workmen's Compensation Law, § 3, subd. 7. It is as follows:

By THE COMMISSION.—The claimant herein was assaulted by two foreign laborers on July 18, 1914, as a result of which he received injuries which disabled him for a period of eight and two-thirds weeks. The claimant was in the employ of the Knickerbocker Portland Cement Company as assistant foreman in an ash-pit at a power house of the company located at Greenport, Columbia county. The men who committed the assault were working under him and immediately prior to the assault, he had reprimanded them for failing to perform their work properly.

Award of compensation is contested by counsel for the insurance carrier upon the grounds that the facts herein fail to bring this claim within the provisions of subdivision 7 of section 3 of the New York Workmen's Compensation Law, which defines "injury" and "personal injury" as meaning: "accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom;" and section 10 of the same law which provides that compensation shall be awarded upon proof of disability resulting from "accidental personal injuries arising out of and in the course of employment."

In other words, it is contended that the above provisions do not embrace injuries received as the result of an assault committed by fellow employees under the circumstances above set forth.

The questions raised refer particularly to the construction to be placed upon the following three phrases, all of which appear in the above named sections of the act:

*First.* Accidental injuries.

*Second.* Arising out of.

*Third.* In the course of employment.

A review of the American compensation statutes shows that the word "accidental" has been omitted in many of the State laws upon the subject. The basis of relief for injuries sustained by workmen has been placed in many of the American jurisdictions upon the ground that the injury was sustained "in the course of employment" and in some jurisdictions the law has referred to injuries which "arise out of and in the course of employment." In these states, therefore, the question as to whether the injuries were accidental does not arise.

The Federal act, for instance, guarantees compensation to certain Federal employees "injured in the course of employment" and contains no reference to "accidental injuries," nor does it contain any provision that the injuries shall arise "out of the employment." Following the wording of the Federal act in its omission of the word "accidental" are the compensation statutes of West Virginia, Washington, Kentucky, Nevada, Louisiana, Iowa, Ohio, Massachusetts, Texas and Connecticut. The decisions therefore under the Federal act and in the above named states offer no solution to the question now before this Commission as to "accidental injuries."

On the other hand, the compensation laws of Great Britain, as well as the compensation laws of New York, California, Rhode Island, Minnesota, Oregon, Nebraska, Kansas, Maryland, Wisconsin, Illinois, New Jersey and Arizona, in referring to the injuries to be compensated under their respective laws, all

provide that the injuries shall have been caused by "accidents" arising "out of and in the course of employment," variously describing the injuries as:

"Personal injuries by accident."

"Accidental injuries."

"Accidental personal injuries."

"Injuries caused by accident."

"Injuries accidentally sustained."

There can be no doubt that the phrase "accidental injuries arising out of and in the course of employment" as used in the latter group of compensation statutes has a three-fold meaning; or rather implies that three conditions of proof must be submitted by claimants for compensation before award can be made under these laws. It must be proved:

*First.* That the injuries are accidental;

*Second.* That the injuries arose out of employment; and

*Third.* That the injuries were sustained in the course of the employment.

It is first necessary, therefore, that the meaning of the word "accidental" be determined. There is no definition of the word "accidental" in the New York Compensation Law. Its meaning must be ascertained by reference to the general definition of the word and by referring to the decisions of the lower courts in cases discussing the question where appeals from compensation awards have been taken from decisions made by commissions under laws containing the word "accident" in describing compensatable injuries.

The decision of the House of Lords in the case of *Fenton v. Thorley* (1903) A. C. 443: 5 Workmen's Compensation Cases, 1; House of Lords, August 7, 1903, established the word "accidental" for the purposes of Workmen's Compensation Law in Great Britain was used in the popular and ordinary sense, and means: "An unlooked for mishap or an untoward event which is not expected nor designed." It is interesting to know that this leading English decision was based upon the decision of the United States Supreme Court in the case of *Mutual Accident Association v. Barry*, 131 U. S. 100.

On account of the similarity between the provisions of the Compensation Law of Great Britain and the New York State Compensation Law (both statutes using the words "accidental injuries") much weight may be given to the definitions and reasoning found in the British decisions dealing with assaults committed by third persons as to the meaning to be placed upon the words "accidental injuries."

The latest reasoning of the courts of Great Britain in defining the word "accidental" as used in the Compensation Law of that country, is found in the very recent decision by the House of Lords in the case of *Kelly v. District School* (April, 1914) 136 L. T. J. (H. L.) 606, wherein an award of compensation was affirmed after appeal from the Court of Appeals of Ireland to the House of Lords. In that case an assistant schoolmaster in an industrial school having, owing to his efforts to maintain discipline, incurred the enmity of some of the boys, *was assaulted by them in pursuance of a pre-arranged plan*, with the result that he died from the effects of the injuries, and it was *Held*, that the occurrence was an "accident" and that it arose out of the employment; that the attack by the pupils upon the teacher was a risk incidental to the employment.

This case follows the reasoning applied by the Irish and English Courts of Appeal in the cases of *Anderson v. Balfour*, 2 Ir. R. (1910) 497 and *Nesbit v. Rayne*, 3 B. W. C. C. (1910) 507, the *Anderson* case holding that a game

keeper should receive compensation for injuries sustained by violence where a poacher shot him; and the other (*Nesbit*) case holding that a cashier carrying wages on a train to a colliery and shot by a stranger is entitled to compensation — each case holding that the assault was an “accidental” injury and defining the word “accidental” as implying something unexpected and undesigned by both master and servant holding that “an act done deliberately and wilfully by a third party may be an accident from the point of view of employer and employee.”

The decisions and reasoning found in the British cases (*Kelly v. District School*, *Anderson v. Balfour*, *Nesbit v. Rayne*, *supra*) conform to the broad intention of the compensation statutes which admittedly is to insure compensation for injuries or death of employees injured in the course of their employment.

The doctrine found in these cases just cited appears sound wherein they say that it is futile reasoning to hold that the test whether or not an injury is accidental should be the intention or state of mind of the person causing the injury. They argue that the intention of the person committing the injury is immaterial. That so far as any consideration of justice is concerned, the intention of the injured should govern. To take a contrary view and deny compensation in assault cases of this character is to refuse to interpret the word “accident” in the spirit in which it must be said to have been understood between the employer and employee.

In determining the intention of the New York Legislature, in its use of the word “accidental,” reference to the Compensation Law itself may be found helpful. We find that the title to this Law reads as follows: “An act in relation to assuring compensation for injuries or death of certain employees in the course of their employment.”

It is true it has been held that no one can resort to the title of an act for the purpose of construing its provisions; still it has been said by a sound and careful judge: “The title of an act of the legislature is no part of the law, but it may tend to show the object of the legislature.”

These are the words of *WHITEMAN, J.*, in *Johnson v. Upham*, 2 E. E. 263.

It should be admitted that if such reference is ever permitted it may be permitted in cases like this, where the legislature was acting upon an entirely new subject.

We may also find assistance in determining the intention of the legislature by referring to the wording of the New York Constitutional Amendment which removes the constitutional restriction against compensation legislation: “Nothing contained in this Constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health or safety of employees, and to compensate employees for injuries or death *without regard to fault* as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another, or where the injury results solely from the intoxication of the injured employee while on duty.”

It will be noted that there is no mention of the word “accident” or “accidental” in this provision of the New York Constitution and it may be said that the underlying idea plainly is that compensation is to follow for injuries to the life, or health of employees without regard to “fault” except where particularly denied upon the ground of “wilful intent to bring about self injury or intoxication.”

Reference is made by counsel for the insurance carrier in the claim now before this Commission to the *old* (lower court) Scottish decision, *Murray v. Denholm*, 5 B. W. C. C. (July 1, 1911) 539, wherein an award of compensation was denied upon the ground that a master was not liable for employee's injuries sustained by way of an intentional criminal assault committed by persons who wilfully and maliciously used violence on an employee for the purpose of intimidating the employee from working, that court stating that the injuries could not be stated to be "accidental" and that the word "accident" as used in its proper and ordinary sense imparts an idea totally inconsistent with injuries maliciously inflicted and that in ordinary and popular language the word "accident" excludes wilful intent to do injury on the part of the person by whose act the injury was caused."

This Scottish decision, *Murray v. Denholm*, has been overruled by the later decisions of the House of Lords above referred to.

Reports of the decisions seem to have applied a natural meaning to the words "arising out of" and to hold that an accident may be said to arise out of employment "when it is something the risk of which might have been contemplated by a person entering an employment, as incidental to it and as a risk in the regular line of his duties and having a relation to the risk excluding all injuries which cannot fairly be traced to the nature of the employment, or which refer to a hazard to which the workman would have been equally exposed apart from employment." *Matter of Employers' Liability Assurance Corporation*, 12 N. E. Rep. 697.

Counsel for the insurance carrier in the case now before the Commission has also referred to the old Scottish case, *Murray v. Denholm*, *supra*, as a case in point and where under facts similar to the facts of the present case, compensation was denied on the ground that the injuries did not arise out of the employment. The facts in the *Murray v. Denholm* case differ from the present case and therefore that decision is not in point.

In the *Murray v. Denholm* case, the injury was sustained *not through the act of a fellow workmen* but through the act of third persons who had given up a situation of employment for reasons of their own and returned to the plant as strike breakers and assaulted the employee.

In the present case it may properly be said that the duty of claimant (foreman) required that he should exercise and control a directing power which would expose him to hostility of employees under his control.

No rules can be laid down to determine what inference the Commission may draw from each particular case, and this case must be decided purely as a question of fact. There is no allegation on the part of counsel contesting the award that the employee in this case did anything reckless or negligent, or that the quarrel or argument was unconnected with what claimant was employed to do.

There is no doubt that workmen engaged in certain kinds of work are liable to be injured on account of the nature of their work by the tortuous act of other persons, to wit: engine drivers and school teachers. See *Challis v. London & Southwestern Rwy.* 21 T. L. R. (1905) 486; *Kelly v. Board of Trustees* (1914) *supra*; *Manson v. Clyde S. S. Co., S. C.* (1913) 921.

As to the question whether the accident occurred while in the course of employment, the facts show that the injury occurred at the plant during working hours. There is no dispute on the part of the employer as to the



truth of these statements. The words "in the course of" mean in the manner and have reference particularly to the time, place and circumstances under which the accident occurred. It may be said that an accident happens to a workman in the course of employment if it happens within the time during which he is employed and at the place where he may reasonably be during that time.

We conclude, therefore, that the injuries received by claimant in this case were accidental injuries within the meaning and intent of the Compensation Law, and that such injuries arose out of and in the course of his employment.

Award of compensation is made accordingly. All concur. *Yume v. Knickerbocker Portland Cement Co.*, S. D. R., vol. 3, p. 353, Jan. 20, 1915.

The third case was that of a workman crippled in a fight with two discharged employees whose places he had taken. The opinion quotes a Massachusetts decision by way of further interpretation of the phrases "arising out of" and "in the course of." The text is as follows:

By THE COMMISSION.—Daniel J. Harnett was injured July 1, 1914, while in employ of the defendant, by being struck with a shovel in a fight with two Italians, who were fellow employees. The assault resulted in the fracture of the left arm, which disabled claimant until August 12, 1914, and claim for compensation is made for four weeks' disability at the rate of eleven dollars and fifty-four cents per week. The two Italians had previously been in the same employ and claimant had been employed to work in their place. Ill-feeling existed upon the part of the two Italians against the claimant, because of his employment subsequent to their discharge.

The question at issue is whether or not the injury was an accidental injury arising out of and in the course of the employment. In claim 15210, *Frank Yume v. Knickerbocker Portland Cement Co.*, the Commission reviewed a large number of decisions under compensation laws in assault cases. The claimant in the Yume case was a foreman and was assaulted by employees who bore a grudge against him because of instructions which he had given them in relation to their work. The Commission held that the injuries were accidental injuries arising out of and in the course of the employment. While the facts in the two cases are not identical the principle involved seems to be the same.

The case *Matter of Employer's Liability Assurance Corporation*, 102 N. E. Rep. 697, which arose in the State of Massachusetts is somewhat similar. In that case claim for compensation was made for a death caused by the assault of a fellow workman, who was in an intoxicated condition. It appeared that the habit of this workman to become intoxicated and his quarrelsome disposition were known to the employers. Speaking of the effect of the words "arising out of and in the course of" the Supreme Judicial Court of Massachusetts said: "It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words which shall accurately include all cases embraced within the

act and with precision exclude those outside its terms. It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed, as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which can not fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

Applying these principles the court held that the injuries arose out of and in the course of the employment. The facts in the case before the Commission are somewhat similar. We believe that the assault in this case was incident to the work and might have been reasonably anticipated, and conclude that the injury was an accidental injury arising out of and in the course of the employment. All concur. *Harnett v. Steen Building Co.*, S. D. R., vol. 2, p. 492, Jan. 20, 1915.

A fourth and much more recent case furnishes an opinion on the subject by the Court of Appeals. This case differs from the others in that the injury was unintentional, though it arose out of a criticism by one employee of the other's method of doing the employer's work. It is as follows:

POUND, J.: This is an appeal by the employer and the insurance carrier from an order of the Appellate Division, third department, affirming by a divided court an order of the state workmen's compensation commission awarding compensation. Claimant was injured when engaged in a hazardous employment. (Workmen's Compensation Law [Cons. Law, ch. 67; L. 1914, ch. 41], § 2, group 27.) The question is whether he received an "accidental" injury "arising out of and in the course of employment." (Workmen's Compensation Law, § 3, sub. 7.) The decision of the commission is final on all questions of fact (Workmen's Compensation Law, § 20), and it is presumed in the absence of substantial evidence to the contrary that the claim comes within the provisions of the act (Workmen's Compensation Law, § 21), but when the undisputed facts in connection with the testimony of the claimant supported by every favorable inference that can be drawn therefrom do not warrant an award, this court will, upon

an appeal from a non-unanimous affirmance by the Appellate Division, reverse upon the question of law thus presented. (*Jerome v. Queen City Cycle Co.*, 163 N. Y. 351, 357.)

The facts are as follows: Claimant on July 14, 1914, was employed as a driver by Jacob Ruppert, Inc., which was engaged in the business of carrying on a brewery. He brought his horses into the stable, where Guth, a fellow-workman, and he unharnessed the horses and proceeded to wash them off with the hose. Claimant told Guth he was using too much water on the horses, and Guth then intentionally sprinkled some water on claimant. Shortly after, claimant having briefly left the place where the horses were being washed, was returning to his work of cleaning the horses when he met Guth. As they passed claimant touched Guth on the shoulder, saying, "George, don't do that again." Guth slapped claimant on the shoulder, and as claimant turned around Guth's finger stuck in claimant's left eye, causing injuries by reason of which it was necessary to remove the eye.

That the injury was accidental within the meaning of the statute seems clear. It was a sudden and unlooked-for misfortune, and the purpose of the act is to insure the workman at the expense of the employer against personal injuries not expected or designed by the workman himself, provided such injuries arise out of and in the course of employment. (*Trim Joint District School Board v. Kelly*, by Viscount HALDANE, Lord Chancellor, House of Lords [L. R. 1914] A. C. 667, at page 679.) But the statute does not provide an insurance against every accident happening to the workman while he is engaged in the employment. The words "arising out of and in the course of employment" are conjunctive, and relief can be had under the act only when the accident arose both "out of" and "in the course of" employment. The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work. A premeditated fatal assault upon a schoolmaster by bad and unruly pupils has been held to be an accident arising out of and in the course of the employment. (*Trim Joint District School Case*, *supra*.) The death of a workman, while he was doing the work for which he was hired, as the result of an assault upon him by an intoxicated fellow-workman whose vicious habits and disposition were known to the foreman was held to be due to the causal connection between the injury to the deceased and the conditions under which the defendant required him to work. (*McNicol's Case*, 215 Mass. 497.) On the other hand, the act has not been applied to accidents resulting from the chances of life in general to which the victim of misfortune was exposed in common with all mankind rather than as employee. In *Craske v. Wigan* ([L. R. 1909] 2 K. B. 635), for example, the nurserymaid, frightened by a cockchafer or giant beetle which flew into the room where she was at work, involuntarily threw up her hand to drive it away and stuck her finger in her eye, thus causing permanent defective vision, and it was held that this was a risk common to all, an accident that might happen to any one, and not arising out of or caused by the employment. (See, also, *Rayner v. Sligh Furniture Co.*, 180 Mich. 168; *Same Case*, L. R. A. 1916a, 22, with notes of cases generally on Workmen's Compensation Acts.) Injuries received through skylarking or

horse play during working hours and at the place of work have been considered by the courts, and it has been held that an accident caused to a workman, while engaged in his work, by the wrongful act of a fellow-workman, entirely outside the scope of his employment, has no relation to the employment and is not within the act. (*Hulley v. Moosbrugger*, N. J. Court of Errors and Appeals [95 Atl. Rep. 1007], reversing *S. C.*, 87 N. J. L. 103.) Altercations and blows may, however, arise from the act of a fellow-servant while both are engaged in the employer's work and in relation to the employment. The employer may be badly or carelessly served by two men engaged in his work, and yet it may be inferred, when one injures the other in a quarrel over the manner of working together in a common employment, that the accident arose out of the employment and was not entirely outside of its scope, if it was connected with the employer's work and in a sense in his interest. Such cases necessarily present close questions of fact. In *McIntyre v. A. Rodger & Co.* (41 Scottish Law Reporter, 107) the Court of Session held that an accident resulting from a tussle between two workmen over the possession of a brush to be used in the work arose out of and in the course of the employment. "But they were both at work," says Lord TRAYNER, "McIntyre doing his work and Clark anxious to get at his work, and in the course of preparing himself for the continuance of his work."

We shall not attempt to formulate any more accurate rules to govern all cases than the general principles above stated. Each case must to a certain extent stand alone. In negligence cases it is not unheard of for different juries to reach opposite conclusions on the same evidence when no claim could be made that either verdict was without evidence to support it. Where conflicting inferences from the same facts are possible, different triers of facts may draw different conclusions, and the weight of evidence is not for consideration in this court. (*Matter of Case*, 214 N. Y. 199, 203.) The evidence in this case is sufficient to permit the commission to find that the following facts sought to be proved were established: that it was an obligation of claimant's employment to take care of the horses which he drove and to see that they were not injured by injudicious wetting or otherwise by his fellow-workmen; that in the course of their employment—while the two men were at work—a quarrel or argument over the wetting of the horses arose and personal injury grew out of the physical contact resulting from the quarrel, and that, therefore, the accident (a) arose out of and (b) in the course of employment.

The act was passed to benefit workmen in hazardous employments who were without a legal remedy. Compensation is given without regard to the fault of the master at common law or under the employers' liability acts. The law has been and should be construed fairly, indeed liberally, in favor of the employee. Against its justice or economic soundness nothing can be said. (*Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514) The power of the legislature to enact such laws is expressly declared to be beyond the limitations of the state Constitution. (Const. N. Y. art. 1, § 19.) It would not be difficult, by an adherence to the concepts of liability for negligence, based on the failure to foresee and prevent accident (*Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271), rather than to the principles of industrial

insurance for injuries suffered by workmen in the course of their employment without regard to fault as a cause of such injury (Workmen's Compensation Law, § 10; *Matter of Post v. Burger & Gohlke*, 216 N. Y. 544), to defeat the purpose of the constitutional and legislative provisions. We think that the doctrine of liability without fault is now too firmly established to require this court to dispose of the question on the facts here presented as a question of law.

The order appealed from should be affirmed, with costs.

WILLARD BARTLETT, Ch. J., COLLIN, CUDDERBACK and SEABURY, JJ., concur; HISCOCK and HOGAN, JJ., dissent.

Order affirmed. *Heitz v. Rupprecht*, 218 N. Y. 148, May 2, 1916.\*

In a fifth case, *Carbone v. Loft*, the Appellate Division on June 30, 1916, affirmed without opinion an award for injury to an employee's finger in a quarrel with a fellow workman.

10. *The injury is caused by a machine owned and regulated by the injured employee.*—An employee injured by a machine owned and regulated by himself may have compensation. A worker upon granite monuments used his own motor cycle not only in traveling between his home and employer's premises but in traveling between his employers' premises and the place of his jobs. One morning after arrival at his employer's premises he lost the ends of two fingers while cleaning the clutch of his motor cycle in preparation for his day's work. The Appellate Division sustained an award of compensation to him, saying:

KELLOGG, J.: The appellants contend that the accident was not one arising out of and in the course of the employment. There is some evidence tending to prove those facts, and under sections 20 and 21 of the Workmen's Compensation Law the decision of the Commission is conclusive upon the facts. Clearly if the motor cycle was only used for the convenience of the claimant in bringing him to and from his place of work, the case would not be within the act. But the evidence shows that from time to time it was used in the business in going to and from the work off the premises, and that at other times when it had been cared for during working hours no question had been raised by the employer. It could not be used in the business unless kept in proper condition. The fact that the workman was engaged upon it near the place of business and during business hours, and that it was frequently used in the business, do not make the findings of the Commission unreasonable. The award is, therefore, affirmed. All concurred, except SMITH, P. J., dissenting.

Award affirmed. *Kingsley v. Donovan*, 169 App. Div. 828, Nov. 10, 1915.

11. *The employee is injured as a result of going to the aid or rescue of another employee.*—Even when an employee leaves the

\* The Appellate Division had affirmed the Commission's award without opinion: 171 App. Div. 961, November, 1915.

work he is doing to go to the help of another employee he may have compensation. The Court of Appeals, in the following decision, has upheld an award of compensation to the dependents of an employee who lost his life while trying to save the life of another employee, though the two were working for different employers. The court said that to hold otherwise would be to "place too narrow a limit upon the nature of the acts to be regarded as pertaining to employment." The Appellate Division had affirmed the award without opinion though by a divided vote (170 App. Div. 942). The opinion of the Court of Appeals, from which there was no dissent, is as follows:

HISCOCK, J.: Roger Waters, the husband of the claimant, was in the employ of the William J. Taylor Company, which had a contract for performing part of the work necessary in the construction of a building. The Duffy Contracting Company was a contractor engaged in performing other work in said construction which necessitated an excavation. While one of the employees of the last-named company was at work in the excavation the bank thereof caved in and he was caught. This occurred about twenty feet from where Waters was at work and he went to the assistance of the endangered employee. While he was engaged in the attempt to release him another cave-in occurred which so seriously injured Waters that he subsequently died.

On these facts the question arises whether the accident to Waters could be found to be one "arising out of and in the course of his employment," emphasis being especially placed on the denial by the insurance company that it arose out of the employment.

There is no question that Waters' attempt to rescue his fellow-workman immediately led to his own injuries, and, therefore, the only debatable phase of the inquiry must be whether his general employment included and required or authorized the attempt to rescue from a sudden peril which threatened his life a fellow-laborer working only a few feet away on the same general undertaking, although for a different employer. It seems to us that this act should be regarded as an incident to and within the fair scope of his employment as the latter should be measured for the purposes of the Workmen's Compensation Act. It occurred while he was at work on the undertaking for which he had been hired, and, therefore, during the course of his employment. It was his employment which brought him where he was, and in a general sense caused him to be confronted with the condition and emergency which he sought to meet. His act was prompted by the relationship existing between himself and a fellow-workman caused by their employment on a common undertaking. It must have been within the reasonable anticipation of his employer that his employees would do just as Waters did if the occasion arose, for it is quite inconceivable that any employer should expect or direct his employee to stand still while the life of a fellow-workman working a few feet away was imperiled by such an accident as occurred here, and it seems to us that the accident arose out of his employment.

It has been held by the Supreme Court of Illinois in a well-considered case (*Dragovich v. Iroquois Iron Co.*, 109 N. E. Rep. 999) that injuries received by one workman while trying to rescue from serious danger another workman of a common employer arose out of his employment. It is true that that decision was to some extent based on the proposition that it would be the duty of the employer himself to attempt to rescue his endangered servant, and, therefore, that the attempt of the employee who came to the latter's rescue was performed in the interest of and for the benefit of his employer. We think, however, that the principle of that case when broadened as it properly may be, tends to sustain the award in this one. Independent of any legal obligation which might require the master to attempt to rescue a servant from the dangers of an emergency, there is a moral duty resting on principles of humanity and those principles ought to apply to a contract of employment and broaden its scope so as to permit a servant to do as Waters did in attempting to rescue a fellow-workman although technically working for a different employer.

Even the rather rigid rules of an action at law for negligence bend before such a situation of peril and without penalty to his rights permit a casual bystander to take risks in the attempt to save life which would be prohibited under any other circumstances. (*Eckert v. L. I. R. R. Co.*, 43 N. Y. 502.)

And certainly it would be a narrow and disappointing view if in judging the conduct of a workman under the remedial provisions of the Workmen's Compensation Act we should hold that the legislature intended to deprive him of the benefits of that act because in going to the rescue of another workman under such circumstances as arose here he has stepped somewhat beyond the limits which would fix the scope of his employment under ordinary circumstances. That act is framed on broad principles for the protection of the workman. Relief under it, generally speaking, is not based on the negligence of the employer or limited to the absence of negligence on the part of the employee. It rests on the economic and humanitarian principles that compensation should be given at the expense of the business to the employee or his representatives for earning capacity destroyed by an accident in the course of or connected with his work, and this not only for his own benefit but for the benefit of the state which otherwise might be charged with his support. This purpose ought not to be defeated by placing too narrow a limit upon the nature of the acts which will be regarded as pertaining to his employment.

Of course what we thus say is to be read in the light of the facts presented on this appeal. There is no trouble in outlining a case where an employee, even with the laudable purpose of helping another, might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment. It is sufficient to say that we do not regard the case now presented to us as being such an one as we have suggested.

The order should be affirmed, with costs.

WILLARD BARTLETT, Ch. J., COLLIN, CUDDEBACK, HOGAN, SEABURY and POUND, JJ., concur. Order affirmed. *Waters v. Taylor Co.*, 218 N. Y. 248, May 12, 1916.

The urgency to help in the Waters case was one of life and death. In the following case, decided by the Appellate Division, such strong incentive was lacking. The employee tried to assist a fellow employee in starting an elevator and lost his life. The court held that it would be construing the Workmen's Compensation Law too narrowly to say that an employee near at hand might not lend a hand without losing his compensation rights:

WOODWARD, J.: Hills Bros. Company were engaged in canning and preserving fruits at an establishment conducted in Brooklyn, and the claimant's husband, Vincenzo Martucci, had been employed by the company for about seven years as a general laborer. He was at the time of the accident, under which this claim arises, employed as a syrup boiler, but was called upon from time to time to make use of a freight elevator in bringing glucose to his boiling pot. This same elevator seems to have been used by other employees in a like manner, no one being regularly employed to operate it. On the 31st day of March, 1915, decedent was at work on the third floor of the company's building when one Kelly, another employee, came down with the elevator from the fifth floor and stopped at the third. In some manner the operating cable became engaged with the floor of the elevator, and it refused to move either up or down. Kelly asked one of the employees to help him, but this particular employee looked at the elevator and walked away without rendering aid. Two others came to the point, one of them being the decedent. The latter jumped down into the elevator car, which had stopped just below the third floor, and grabbed hold of the operating cable with his hands and so manipulated it that the obstruction was removed and the car fell to the basement, taking the decedent with it, producing injuries from which he subsequently died. The State Industrial Commission has awarded compensation to decedent's widow and family, and the employer and the insurance company appeal to this court from such awards.

No complaint is made as to the amount of the awards, but it is urged that the decedent was not injured in the manner prescribed by the Workmen's Compensation Law to entitle his family to compensation. The appellant's theory is that the decedent, who was employed as a syrup boiler, did not receive his injury while engaged in boiling syrup, and that the personal injuries were not, therefore, "sustained by the employee arising out of and in the course of his employment," as provided by section 10 of the act in question. (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 10.) There is evidence in the case to the effect that the work of the decedent was that of a syrup boiler, and that he was thus engaged when the elevator came to a standstill and refused to move, and it is contended that the Hills Bros. Company, having provided an engineer whose duty it was to make all repairs in the machinery, the act of the decedent in attempting to aid Kelly in starting the elevator was outside of his duties, and that the insurance did not cover his case.

It is doubtless true that the facts would not support a judgment under the common law, nor under the Employers' Liability Act (Labor Law [Consol. Laws, chap. 31; Laws of 1909, chap. 36], art. 14, as amd. by Laws of 1910,



chap. 352), but the Workmen's Compensation Law contemplates charging the industrial life of the State with the burden of accidents incident to such industry within the limits fixed by the act, and we are not prepared to hold that a common laborer is not in the course of his employment when he steps aside from his immediate employment to give incidental aid to a fellow-employee in the operation of a freight elevator which is operated in common by all of the employees. It does not appear that the elevator had been broken or damaged; merely that it had ceased to respond to the operating cables, and to say that a man who is at work near the point may not lend a hand in starting this elevator without sacrificing his rights under the law is too narrow a construction to apply in the construction of the statute. If the decedent had himself been using the elevator as Kelly was doing—and this was among his duties—there would have been no doubt of his being protected while trying to start the elevator, even though the Hills Bros. Company had employed an engineer to make repairs, and no good reason suggests itself why he might not have left his boiling pots for a few moments to aid a fellow-laborer in an effort to start this same elevator.

We think the award of the State Industrial Commission should be approved. Award unanimously affirmed. *Martucci v. Hills Bros. Co.*, 171 App. Div. 370, January 18, 1916.

In an earlier case, *Harrison v. Kane*, 169 App. Div. 905, May 28, 1915, the Appellate Division had unanimously affirmed an award to an employee of one contractor upon a building who had been injured while assisting the employee of another contractor.

d. *The employee is injured through negligence or wrong of another not in the same employ.*—Even when the employee has been injured by another not in the same employ he may have compensation. Section 29 of the Workmen's Compensation Law grants him the privilege as an alternative to an action against the third party for negligence.\* Furthermore, said section declares that even when he elects to bring the negligence action against the third party he may in the end claim compensation to the amount of any deficiency between the sum that he recovers and the sum that would have been allowed him had he elected to claim compensation. This latter provision vitally interests his employer's insurance carrier in the amount that he can recover by his action for negligence. The law therefore says that he must give notice of his election to pursue the action for negligence. That the insurance carrier may know of it, he must evidence such election "in such manner as the commission may by rule or regulation prescribe." Failure to give such notice, according to *Lester v. Otis*

\* Compare "Substitution of law of compensation for law of negligence," above, p. 50. A minor employee may make this election. *Herkey v. Agar Manufacturing Co.*, 90 Misc. 465, May, 1915; text, above, p. 32.

*Elevator Co.*, bars him from claiming deficiency compensation, if any there should be. The decisions of the Appellate Term and the Appellate Division in this case are as follows:

*(Lester v. Otis Elevator Co., Appellate Term.)*

GUY, J.: In this action to recover damages for personal injuries received by the plaintiff, an employee of Bing & Bing, in the course of his employment, arising out of what may be termed common law negligence, judgment has been rendered in his favor against the defendant Otis Elevator Company.

The work done by the plaintiff was hazardous employment within the meaning of the Workmen's Compensation Law, and his employers, when the action was brought, had complied with all the requirements of the act as to providing insurance for their employees.

Section 29 of the statute is as follows:

If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman or, in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such cause. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association, or corporation liable to pay the same.

Prior to the commencement of this action the commission had by suitable rules and regulations ordained the manner in which the election provided for in the foregoing section should be exercised; but the plaintiff brought suit without making the prescribed election, and the appellant claims that his failure to comply with the statute in this respect is fatal to the judgment.

Under section 10 the employers were required to compensate for the injuries, even though caused by a third party, and section 11 provides that the liability prescribed by section 10 "shall be exclusive," except that if the employer fails to comply with the statute the injured employee or his representative may "elect to claim compensation" under the act or to maintain an action for damages on account of the injury, in which action the defendant cannot avail himself of the defenses that the injury was caused by the negligence of a fellow-servant or that the employee assumed the risk of his employment or that the injury was due to his contributory negligence.

Although section 11 states that the liability prescribed by the statute shall be exclusive, I am of the opinion that this refers solely to the liability of the employer, and that the act does not prevent an injured employee such as the plaintiff from seeking redress in a common law action as against third parties causing his injuries.

A consideration of all the provisions of section 29 in connection with other parts of the act indicates that to carry out the scheme of subrogation provided for in that section the "suit" referred to therein is any suit, whether

pursuant to the act or otherwise; that an employee sustaining injuries in the course of his employment through the acts or defaults of a party other than his employer, and suing such party, is required to make and signify his election in accordance with the statute and the rules and regulations of the commission as a condition precedent to the collection through the commission of any deficiency between the recovery in the action and the compensation provided for by the act; that no such election having been made by the plaintiff he has no right to such deficiency, if any, but that the failure to make the prescribed election in no way affects the judgment appealed from which should be affirmed with costs.

Judgment affirmed, with costs, with leave to defendant to appeal to the Appellate Division.

LEHMAN, J. (concurring): The plaintiff has recovered a judgment for injuries suffered through the negligence of the defendant's employees. At the time of the accident the plaintiff was working on a building which was being constructed by Bing & Bing, as general contractors, and the plaintiff was in their employ. The plaintiff's injuries resulted "from an accidental personal injury sustained by the employee arising out of and in the course of his employment" within the meaning of section 10 of the Workmen's Compensation Law, and the plaintiff's employment was hazardous within the meaning of section 2 of the same law. His employers had complied with all the requirements in regard to insurance provided by that law, and undoubtedly the plaintiff could have obtained compensation by claim to the commission. He preferred, however, to bring this suit against the defendant.

Section 11 of the Workmen's Compensation Law provides that "the liability presented by the last preceding section shall be exclusive," except that if an employer fails to secure the payment of compensation for his injured employees and their dependents as provided in section 50 of this chapter an injured employee or his legal representative in case death results from the injury may at his option elect to claim compensation under this chapter or to maintain an action in the courts for damages on account of such injury, and in such an action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant or that the employee assumed the risk of his employment or that the injury was due to the contributory negligence of the employee. The meaning of this section seems to me to be quite clear when read in conjunction with the remainder of the law. By virtue of section 10 a liability unknown to the common law was imposed upon employers in designated employments to pay compensation for practically all injuries sustained by an employee arising out of and in the course of his employment "without regard to fault as a cause of such injury." In other words, the expense of compensating employees for all injuries sustained was made a burden upon the industry and the old common law doctrine that compensation can only be obtained from a party whose fault caused the injury was abandoned. In order to make the new system complete it was provided that this form of compensation should be "exclusive" except where the employer failed to secure the actual payment of this compensation to the employee as provided by law. By means of these sections the legislature has attempted to solve the difficult problem of securing to the employee fair compensation for injuries. It has, however, merely attempted to deal with the liability of the employers

toward their employees and while the new liability it has provided is declared to be "exclusive" it seems to me quite clear that the word "exclusive" refers only to the liability which the new law deals with, i. e., the liability of the employer to his employee and that it would be absurd to hold that the legislature had any intention of depriving an injured employee of any common law rights against third parties.

This construction is obviously borne out by the provisions of section 29 which reads as follows:

Section 29. Subrogation to remedies of employees.—If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or, in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such cause. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association or corporation liable to pay the same.

Under this section it appears expressly that an employee has a right to "elect whether to take compensation under this chapter or to pursue his remedy against such other" and it follows therefore that the Workmen's Compensation Law has not deprived an injured employee of his common law right of action against a negligent third party.

It is urged; however, that since this section provides that "such injured workman \* \* \* shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against the other" the plaintiff in this common law action must plead and prove that he has made such election in the manner prescribed by the rule or regulation of the commission. It seems to me, however, that such a construction of this section is forced. The law requires an election only "before any suit or claim *under this chapter*" and the words which I have italicized refer to and limit both the words "suit" and "claim." It seems to me that the words quoted, standing even alone, and the strict grammatical construction thereof, show that this was the meaning of the legislature, and the whole tenor of the statute shows that this was the legislative purpose. As stated above, the only liability which the legislature has attempted to deal with is the liability of the employer. The statute in nowise attempts to regulate or change the ordinary common law liability of other parties for their own negligence, but since the employer is made liable for injuries without regard to his fault it properly provides that he, or the fund or person or corporation ultimately liable, shall be subrogated to the remedy which the employee may have against third parties provided the employee elects to take compensation under the statute, or if the employee elects to proceed against a third person who is liable as at common law for his negligence that such fund, person or corporation shall be liable to compensate the employee only for the deficiency between the amount of

recovery actually collected and the compensation provided by the statute. The plain purpose of this section, it seems to me, therefore, is to give an employee injured through the negligence of a third party an election between a claim or suit against the employer under the new form of liability created by the statute and an election at common law against the negligent party; and inasmuch as the negligent party should in any event be the person ultimately liable and the employer should under no circumstances be held to a liability beyond the compensation fixed by the statute, the statute provides that the party seeking to obtain any benefit from the statute shall before suit or claim under the statute make his election as to the form of remedy he will pursue in order that the employer or the insurance fund shall not be forced to pay more than the established rate of compensation and shall be in a position to set off against this liability any recovery which can be enforced against a negligent third party. The very purpose of this section appears in the title of this section, viz.: "Subrogation to remedies of employee." I can see no reason why this section should be so construed as to provide that an employee desiring to sue a third party must before bringing such action file as a condition precedent to enforcing his common law rights an election to make his claim at common law. If we so construe the statute it seems to me that we must hold that the legislature has placed persons employed in certain hazardous occupations in one peculiar class not only as regards their rights against their employers where there is good ground for such classification but also as against third parties guilty of negligence where I can find no possible ground for such classification. The third party sued as at common law is in any event liable either to the injured employee or to his assignee and in no event is he liable to both. As far as such person is concerned it is quite immaterial whether an election has been made or not and we should not, I think, construe this statute in such manner as to limit the injured party's common law right by requiring him to do any act under the Workmen's Compensation Act in order to enforce a liability which exists at common law. If the legislature had intended to derogate in this particular from the common law it would have so provided in an explicit manner. If the plaintiff in this action should compromise the action for an amount less than the compensation provided by the statute he would undoubtedly not be in a position to enforce under the statute any claim for the deficiency and there is some doubt as to whether he has not forfeited all claim under the statute by bringing this action without previously filing an election. That question, however, I think affects only his right to a suit or claim against the employer and not his right to a suit at common law.

WHITAKER, J. (dissenting): In July, 1914, plaintiff was a "hodcarrier" in the employ of Bing & Bing, building contractors. The plaintiff was engaged in wheeling mortar to the bricklayers, pushing his wheel-barrow over a runway or gangplank. The gangplank or runway went across the top of a hole. This hole was made by the defendant, the Otis Elevator Company, for the purpose of installing an elevator; it was required for the plunger of the elevator. The hole was being dug by means of a core barrel, sixteen inches in diameter by twenty feet in length. It was necessary at times to lift this core barrel out of the hole. While so doing the plunger

was placed upon the plank or runway in such a way that the plank turned over or tipped up and threw the plaintiff, who was standing thereon, into the hole. The details of the accident and position of the plank, etc., were given in full by plaintiff. And if the narration of the plaintiff as to the nature of the runway, the work the defendant was engaged in and the manner in which the accident happened were true, and the jury has found that such narration was true, we think negligence upon the part of the defendant was sufficiently shown to sustain the verdict of the jury.

The appellant asks for a reversal upon two grounds, first, that the charge of the court was erroneous in not properly submitting to the jury, as a question of fact, the defendant's alleged negligence. We think the court did in substance charge the jury sufficiently upon this point. The court stated to the jury:

"The main question here is whether this man was hurt through the carelessness or negligence of any one else. If he was hurt through his own carelessness or his own negligence, why of course he cannot recover."

The court then stated the facts alleged to constitute the negligence complained of, and adds:

"Now if you first get settled through this testimony that that act was brought about or occurred through no neglect of this plaintiff, then the next question is, through whose neglect was it?"

The court also further stated: "The neglect of this defendant is important. If this defendant was negligent through its workmen in not safeguarding the appurtenances and appliances of this construction company, so that they would not injure them or the men on them, they owe a responsibility or take upon themselves the responsibility of any damages following this."

While not as explicit as it might have been made, I think it is fair to assume that the jury understood that negligence on the part of the defendant was required to be shown before plaintiff was entitled to a verdict. The defendant took no exception to the portion of the charge now complained of, and it is too late to raise the objection in this court. The appeal is not from the order denying the defendant's motion for a new trial but from the judgment.

The other ground upon which defendant asks a reversal is stated in his brief as follows: "The plaintiff failed to establish sufficient facts to constitute a cause of action by failing to allege and prove an election in accordance with the Workmen's Compensation Act."

In other words, inasmuch as the plaintiff and the firm for which he was working came directly within the provisions of the Workmen's Compensation Act, that before plaintiff could recover from a "third person," to wit, the Otis Elevator Company, he was required to file a notice of election as required by section 29 of that act.

The record discloses that plaintiff was in the employ of Bing & Bing and not the defendant, the Otis Elevator Company, and that Bing & Bing, plaintiff's employers, were engaged in a character of business to which the Workmen's Compensation Act applies; that Bing & Bing had complied with the provisions of the act for the protection of both plaintiff and themselves, and all were subject to its provisions.

Section 10 of the act, so far as material, provides as follows:

**Liability for compensation.**—Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee *arising out of and in the course of his employment*, without regard to fault as a cause of such injury \* \* \*.

**Section 11. Alternative remedy.** The liability prescribed by the last preceding section shall be *exclusive*, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section 50 of this chapter, an injured employee \* \* \* may at his option elect to claim compensation under this chapter, or to maintain an action in the courts for damages \* \* \* and in such an action defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

Section 50 referred to provides that employers must procure a fund applicable to the payment of the amounts awarded to the injured employee by the commission, whose appointment is provided for in the act.

Section 52 provides that the failure of employers to secure the compensation "shall have the effect of enabling the injured employee" "to maintain an action for damages in the courts" as prescribed by section 11, which is above quoted.

It will be observed that under the provisions of section 11 it is only when the employer fails to comply with section 50 requiring the employer to secure funds, etc., that he is authorized to bring an action in the courts. Should the employer fail to provide the fund, as required by section 50, the employee may sue in the courts and certain specified defenses of the employer are cut off, or the employee may file a claim instead of bringing a suit, and should he pursue the latter course provision in subsequent portions of the act is made for procuring the payment of the scheduled rate to the employee.

Section 18 provides that notice of an injury for which compensation is payable shall be given to the commission and employer within ten days after disability and prescribes how the notice shall be given, etc.

After the claim has been submitted to the commission full and ample provision is made for fixing the amount and securing payment to the person injured.

The above provisions are equally binding upon the employer and employees. And after the employer has conformed to the provisions of the act, in order to secure the payment of awards for injuries to the employees, the employees are precluded from bringing an action for damages. Not only does section 11 expressly provide that the liability of the employer shall be exclusive, but the tenor of the entire act indicates that such was its general purpose. To hold that the employee could elect to sue for an injury or accept the benefits of the act at his option, would make the employer liable for every injury to the employee and take away from him all defenses with no reciprocal benefits in return.

Sections 29 and 67 provide as follows:

**Section 29. Subrogation to remedies of employees.** If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe.

**Sec. 67. Rules.** The commission shall adopt reasonable rules, not inconsistent with this chapter, regulating and providing for

1. The kind and character of notices, and the service thereof, in case of accident and injury to employees;

5. Carrying into effect the provisions of this chapter.

The commission has adopted reasonable rules in reference to the form of the notice required and the service thereof.

Respondent maintains that this section does not apply to the present case; that the present action is not one under the terms of the act at all; but against a third party with whom the plaintiff had no contractual relation.

If respondent's position is correct, section 29 becomes absolutely meaningless. This would be contrary to all rules of statutory construction. Respondent seeks to illustrate the soundness of his contention by instancing the case of an employee being injured while riding on a railroad train as a passenger for hire. This is not an analogous case. Such a case would not come within the terms of the section, for the reason that such an injury would not be one "arising out of and in the course of his employment." Plaintiff's injury did arise out of and in the course of his employment, and Bing & Bing, his employers, were required to compensate him for his injury. If respondent had been injured by a railroad company while traveling to and from the place of his employment, Bing & Bing would not be required to compensate him under the provisions of the act because plaintiff's injury would not have arisen out of and in the course of his employment.

Although in the case at bar the injury to plaintiff was caused by a "third party," that is, a party with whom plaintiff had no contractual relations, viz., the Otis Elevator Company, still Bing & Bing, his employers, would have been required to compensate plaintiff had he filed his claim and given the notice required. Under the provisions of section 29, however, plaintiff had his option to take compensation under the provisions of the Compensation Act from his employers, Bing & Bing, or to sue the person through whose negligence he was actually injured. In either case, however, he is required to serve notice of his election, in the manner prescribed by the commission, and the commission has duly and properly prescribed the manner in which such notice shall be given. Section 29 of the statute, no doubt, had in contemplation just such cases as the present, where different contractors are working upon the same structure, and there is a question as to which contractor is liable for the injury.

The liability of the employer and the remedy of the employee being exclusive, and the plaintiff's only remedy being under the statute, he was required to comply with the terms of the statute in order to be entitled to its benefits. The requirements of notice of election are, we think, conditions precedent and should have been alleged in the complaint and proved upon the trial. *Rosenstock v. City of New York*, 97 App. Div. 337; *affd.*, 181 N. Y. 550.

Judgment should be reversed and complaint dismissed, with leave to plaintiff to apply to the compensation commission for such relief as the commission may deem him entitled to.

Judgment affirmed, with costs. *Lester v. Otis Elevator Co.*, 90 Misc. 649, June, 1915.

(*Lester v. Otis Elevator Co.*, Appellate Division.)

MCLAUGHLIN, J.: This action was brought in the Municipal Court of the city of New York to recover damages for injuries alleged to have been sustained through the negligence of the defendant. On July 17, 1914, the plaintiff was an employee of the firm of Bing & Bing, which was engaged



in the construction of a building in the city of New York. Upon the same premises the defendant was engaged in drilling a hole for the plunger of an elevator. In removing the drill for the purpose of cleaning it, defendant, in some way, upset the runway on which plaintiff was at work wheeling mortar, and he was thrown off, sustaining the injuries of which he complains. At the trial the plaintiff had a verdict, and the judgment entered thereon was affirmed by the Appellate Term, with leave to defendant to appeal to this court.

The appeal presents a single question and that is whether, under the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1913, chap. 816, as re-enacted by Laws of 1914, chap. 41), the plaintiff could maintain the action without alleging and proving his election to do so, pursuant to section 29 of that act.

The Workmen's Compensation Law provides a fixed schedule of the rates of compensation to be paid by employers to employees injured in the course of certain hazardous employments, irrespective of the fault occasioning the injury, and establishes a commission to administer the statute and make awards. Employers are required to secure the payment of the prescribed compensation in the manner provided in the statute, and it is conceded that the plaintiff's employers, Bing & Bing, had done so, and that the plaintiff might have applied for such compensation, instead of claiming damages from the defendant.

Section 29 provides:

Subrogation to remedies of employee. If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association, or corporation liable to pay the same.

In the present case the plaintiff in fact elected to pursue his remedy against the defendant, instead of claiming compensation under the statute, as an employee of Bing & Bing. But it is conceded that he did not file any evidence of his election with the Commission, although the Commission had, pursuant to section 29, prescribed a form of notice to be filed with it in such cases. The defendant claims that the filing of such a notice was a condition precedent to the maintenance of the action, and the court below was divided upon that point. (90 Misc. Rep. 649.)

Under section 29, the plaintiff was required to file such notice only *before any suit or claim under this chapter*. The present action was not a suit or claim under the statute, but a common-law action against the defendant for negligence. The plaintiff was not employed by the defendant, and it is a rather startling proposition that a third party can defeat an action against

him for negligence merely because the victim happened to be an employee of another person and had not filed with the Commission a notice of his election to exercise his common-law rights.

In requiring an employee to make and evidence his election "before any suit or claim under this chapter," it seems to me that the Legislature clearly intended the words "under this chapter" to modify both "suit" and "claim," so that the third party is not entitled to insist that such notice be given. If these words are construed to mean any suit, including a common-law action against a third party, then the section is in derogation of the common-law rights of the employee—a construction to be avoided where possible. (*McManus v. Gavin*, 77 N. Y. 36; *Seligman v. Friedlander*, 199 id. 373; *Rosin v. Lidgerwood Mfg. Co.*, 89 App. Div. 245.)

We might rest our decision upon this point alone. But it is urged that the whole purpose of the statute was to protect employees of the classes enumerated and that it should be construed to this end as regulating their rights and remedies against third parties, as well as against their employers. On the contrary, it seems to me that an examination of the statute only strengthens the conclusion that such was not the purpose of section 29.

The statute, as originally enacted, was entitled "An Act in relation to assuring compensation for injuries or death of certain employees in the course of their employment \* \* \*." Section 2 enumerates the hazardous employments to which the statute applies. Sections 14-16 provide fixed schedules of compensation to be paid for injuries, and section 50 requires employers to secure the payment of such compensation to their employees, in one of the ways specified in the section. Section 52 provides that the failure of an employer to secure compensation shall enable an injured employee or his dependents "to maintain an action for damages in the courts," as prescribed in section 11.

Section 10 requires every employer to pay or provide the scheduled compensation for accidental injuries sustained by an employee in the course of his employment, "without regard to fault as a cause of such injury," except where due to the intoxication or willful intention of the employee; and section 11 provides that the liability prescribed in section 10 is exclusive, except that if an employer has failed to secure compensation as required by section 50, the employee or his representatives may, at their option, either claim compensation under the statute, or "maintain an action in the courts for damages on account of such injury," in which action neither contributory negligence, the assumption of risk nor the negligence of a fellow-servant may be pleaded as a defense.

All these provisions clearly relate only to rights and remedies as between employer and employee. As was fully explained in *Matter of Jensen v. Southern Pacific Co.* (215 N. Y. 514), where the constitutionality of the statute was upheld, the employer is required to pay a fixed compensation for injuries sustained by an employee in the course of his employment, entirely irrespective of the question of negligence. This liability is absolute and is exclusive, unless the employer has failed to secure the payment of compensation in the manner provided in section 50. In that case, and in that case only, the employee may bring an action for damages, with the common-law defenses specified in section 11 barred. It is perfectly clear that the "action in the courts for damages" mentioned in sections 52 and

It is an action against the employer only. It cannot possibly mean an action against a third party, though not infrequently an employee may be injured in the course of his employment by the negligence of a third party, as occurred in the present case.

Nowhere in the statute, therefore, is there any attempt to regulate or alter the rights and remedies of an employee against a third party, unless it be contained in section 29. But in the light of what has been said, the purpose of section 29 seems perfectly clear.

Where an employee is injured by the act of a third party, in the course of his employment, he is nevertheless entitled to claim compensation under the statute. But it is only reasonable that, in such cases, the third party should be made to pay the damages caused by his wrongful act, and, of course, the employee is not entitled to such damages and the statutory compensation at the same time. Section 29 accordingly makes provision for the employer's "Subrogation to remedies of employee." Under that section, if the employee claims compensation under the statute, his cause of action against the third party is assigned to the State, if the compensation is payable from the State insurance fund, and otherwise to the person liable for the payment of the compensation. In other words, the party who has to pay or secure the statutory compensation can then recover the damages for which the third party is liable.

Section 29 does not, however, prevent an employee from bringing an action for damages against such third party himself; it recognizes his right to do so if he chooses. But if he does elect to do so, he can claim compensation under the statute only for the deficiency, if any, between the amount collected from such third party and the statutory compensation.

The employer, or the person liable for the payment of the statutory compensation, is thus vitally interested in the outcome of such an action brought by an employee. For the protection of the employer or the person liable as aforesaid, section 29 requires the employee, before any suit or claim under the statute, to make and evidence his election. If he elects to claim under the statute, then the employer or the person liable for the payment of the statutory compensation is subrogated to his rights against the third party. If he elects to pursue his remedy against the third party, the employer or the person liable as aforesaid has notice and can take steps to see that an adequate recovery is obtained. For his further protection, compromises for less than the statutory compensation are forbidden without his written approval.

It was doubtless expected that employees would ordinarily choose the prompt and inexpensive remedy given them under the statute and leave it to the employers and insurers to collect the damages from the third party. An employee would hardly go to the trouble and expense of bringing such an action himself unless he hoped to recover from the third party more than the statutory compensation. In the similar statutes of other States which I have examined the employee is given the election whether to sue, or to claim compensation under the law. Under our statute, however, he may sue and still hold the employer liable for the deficiency if he fails to recover and collect the statutory amount.

It seems to me, therefore, that the requirement that the employee give evidence of his election to sue was intended solely for the benefit of the

person liable for the statutory compensation and was not intended to curtail or affect the existing remedies of the employee against the third party. Section 29 fully recognizes the common-law remedy of the employee, and there is nothing in the statute to indicate that the Legislature intended that it should be affected.

It is doubtless a necessary conclusion that where an employee brings such an action, without having duly evidenced his election to do so, he would not be entitled to any compensation under the statute, even though he did not recover in such action the full amount to which he would have been entitled under the statute. Such a situation could arise only through the failure of the employee to claim compensation under the statute and his disregard thereof in failing to give notice of his election. Neither the language nor the obvious purpose of section 29, however, would justify a construction holding the giving of such notice to be a condition precedent to the maintenance of a common-law action by an employee against a third party.

The determination appealed from should, therefore, be affirmed, with costs.

INGRAHAM, P. J., LAUGHLIN, SCOTT and DOWLING, JJ., concurred.

Determination affirmed, with costs and disbursements. *Lester v. Otis Elevator Co.*, 169 App. Div. 613, Nov. 5, 1915.\*

e. *The employer has failed to take out insurance in compliance with the Workmen's Compensation Law.*—Even when the employer has failed to take out compensation insurance the injured employee may have compensation. Section 11 of the Workmen's Compensation Law grants him the privilege as an alternative to an action against his employer for negligence in which the usual common law defenses may not be pleaded. The section lacks the detail of Section 29, noted above, which provides a similar alternative of remedy. Many claims for compensation where the employer has failed to insure are presented to the State Industrial Commission. It would seem to be the administrative practice of the Commission to hold hearings and pass upon such claims. Whether or not the injured employee who receives an award receives payment thereof would seem to depend upon the employer's willingness or ability to pay or the ability of the counsel to the Commission to collect.

The Appellate Division has been called upon to interpret the phrase "legal representative" in Section 11 and has declared that it "means the dependent and not the executor or administrator," the effect being that the widow of an employee who loses his life does not need to qualify as an executrix or an administratrix in

\* The Lester and other third party cases are considered from the view-point of the law of negligence, above, pp. 116-126.

order to make the election permitted by the section. The opinion of the majority and the concurring opinion of Justice Howard are as follows:

SMITH, P. J.: The employer failed to take out insurance required by the Compensation Law. By section 52 of that law the "failure to secure the payment of compensation shall have the effect of enabling the injured employee or his dependents to maintain an action for damages in the courts, as prescribed by section eleven of this chapter." Section 10 provides the liability for compensation, and section 11 (as amd. by Laws of 1914, chap. 316) reads: "The liability prescribed by the last preceding section shall be exclusive, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee." Upon an examination of the whole statute, in connection with the purposes of its enactment, I am convinced that the "legal representative" referred to in section 11 means the dependent and not the executor or administrator. In *Matter of Woodcock v. Walker* (170 App. Div. 4), decided this term, we are holding that the allowance to an infant child is payable to the widow, and in the opinion it is stated: "It does not seem probable that it was the intention of the Legislature to require the appointment of a general guardian with an attendant expense in order to enable the children to collect the amounts allotted to them under the act." This "legal representative" may elect either to proceed under the Compensation Law before the Commission, or to bring an action. By parity of reasoning it is not probable, at least if election be made to proceed under the Compensation Law, that first an executor or administrator must be appointed, with its attendant expense. Such a construction would be contrary to the general scheme of the statute, and would tend to make a proceeding more complex than would be a proceeding directly by the dependent himself. A dependent who was not a next of kin and not a creditor would have no standing in a Surrogate's Court to compel the appointment of a "legal representative," as the term is sought to be interpreted by defendant. The ordinary action for negligence given to the personal representative of a deceased is brought for the benefit of next of kin. (Code Civ. Proc. § 1902 *et seq.*) The action here authorized is brought for the benefit of certain dependents, and must be decided upon rules of law differing materially from those which govern the ordinary action for negligence by the personal representative.

Again. This election to be made either to proceed under the Compensation Law or by separate action, would more naturally be made by those directly interested than by any one representing the estate as a personal representative. It may be suggested that there might be difficulties in case some of the dependents might elect one course and some another. The

answer to that suggestion would seem to rest in the provision of section 29, which provides in a certain case for the election by dependents, and provides that "such election shall be evidenced in such manner as the Commission may by rule or regulation prescribe." So election under section 11 might be exercised "in such manner as the Commission may by rule or regulation prescribe."

Notwithstanding this conclusion I am of the opinion that the matter should be sent back to the Commission to ascertain the exact status of the deceased, through whom claimants assert their claims. The defendant before the Commission apparently relied upon its legal ground that the proceeding could only be brought by a personal representative appointed by the surrogate, although the objection was never formally taken until this appeal. If this matter be sent back to the Commission the contract under which the claimed employee was acting may be introduced in evidence and his exact relation to the employer be established. In my judgment this award should be set aside and the matter referred back to the Commission, that opportunity may be given to the defendant to introduce such evidence as it may desire upon the nature of the employment of the deceased.

All concurred, HOWARD, J., in result in opinion, except WOODWARD, J., who voted to reverse and to disallow the claim.

HOWARD, J. (concurring in result): In this case a dependent widow, assuming to have the right to do so under section 11 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1914, chap. 316), has elected to claim compensation under this act. The employer, who appeals from the award herein, contends that the widow was not authorized by section 11 of the act to make the election and prosecute the claim herein, but that it could only be done by the "legal representative" of the deceased; that is, by the executor or administrator.

Section 11 of the Workmen's Compensation Law provides that "if an employer fail to secure the payment of compensation for his injured employees and their dependents \* \* \* an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury."

Section 52 of the act provides that "Failure to secure the payment of compensation shall have the effect of enabling the injured employee or his dependents to maintain an action for damages in the courts, as prescribed by section eleven of this chapter."

These two sections are in discord. They do not work together. Either one or the other must be, to a certain extent, a nullity unless the courts harmonize them. The dependents of a deceased employee cannot maintain an action "as prescribed by section eleven," for section 11 makes no provision whatever for an action by dependents. Therefore, we must hold either that the words "legal representative" in section 11 mean dependents, or that the word "dependents" in section 52 means legal representatives. This must be our position unless we are willing to hold that the effect of both sections (if we are to accept them literally) is to give a cause of action to either the legal representatives or the dependents. But this, probably, was not the intention of the Legislature. The spirit of the Workmen's Compensation Law, as well as sound reasoning and precedent, require

us to hold that the words "legal representative" as used in section 11 should not be restricted to their narrow, legal, technical meaning but should be so construed by us as to avoid the interposition of any agency or delay between a dependent widow and the succor given by this humane law.

A "legal representative," that is, an executor or administrator, could in no event have any interest in the award. An executor or administrator stands in the shoes of the deceased and represents the estate of the deceased — represents it, among other things, in its relation to creditors. But creditors have no claim and can never have any claim to awards under this act. (§ 33.) The compensation provided for in the act, in case of death, goes to the dependents to furnish food and shelter and support — not to the legal representatives to pay debts and commissions. The whole scheme of the law, in the prosecution of claims, is simplicity. Indirection, red tape, roundabout routes, the intervention of unnecessary parties and officials, useless delay — all this the Workmen's Compensation Law seeks to avoid. Everything must be summary, simple and speedy. All superfluities are repugnant to the spirit of the act.

But we are not forced to take the initiative in holding that the expression "legal representative" does not necessarily mean executor or administrator. The Court of Appeals has established a precedent for us; a precedent even under normal laws. (*Griswold v. Sawyer*, 125 N. Y. 411.) But here we are dealing with an extraordinary statute, a statute modern and revolutionary and every word of which breathes summary justice. Therefore, if under the common law, the expression "legal representative" has been held flexible enough to mean "next of kin," *a fortiori* it should here be held flexible enough to mean dependents.

The award, except as to the penalty of fifty per cent, should be affirmed.

Award set aside and matter remanded to Commission that the defendant may be given an opportunity to introduce such evidence as it may desire upon the nature of the employment of the deceased. *Dearborn v. Peugeot Auto Import Co.*, 170 App. Div. 93, Nov. 10, 1915.\*

f. *The injured employee is away from the plant of his employer at the time of the injury.*— Even when the employee is injured at a distance from his employer's plant he may have compensation. The Workmen's Compensation Law, § 3, subd. 4, in defining an "employee," so provides in terms so plain that adjudication of the point in the courts has not been necessary. Furthermore, this definition has been one of the grounds upon which the courts in the cases under the following title have decided that the Workmen's Compensation Law applies to injuries of employees occurring beyond the state's bounds. In *Fiocca v. Dillon*, S. D. R., vol. 7, p. 399; — App. Div. —, November 15, 1916, a tailor injured

\* The Commission having taken further testimony, has stated its findings and made a second award to Dearborn's widow: S. D. R., vol. 7, p. 413, Feb. 3, 1916, which has been affirmed by the Appellate Division, November 15, 1916. L. 1916, ch. 622, harmonises § 11 with § 52 of the Workmen's Compensation Law by inserting the phrase "or legal representatives" in § 52.

by his scissors while doing piece work at his own home received compensation.

*g. The injured employee is without the state at the time of the injury.*—The State Industrial Commission has ruled that the Workmen's Compensation Law has extraterritorial effect, and this ruling has been sustained by the Appellate Division and the Court of Appeals. The leading case is that of *Post v. Burger & Gohlke*, the decisions in which are reproduced below. It will be noted in the opinion of the Court of Appeals: 1. that the Legislature has the right to enforce a contract between employer and employee that is extraterritorial in effect; 2. that the Compensation Law as enacted is actually extraterritorial in its application; and 3. that a resident of New York employed by a domestic corporation doing business in this state, who is sent by his employer into New Jersey to do similar work away from his employer's plant but under his direction, is entitled to compensation for injuries received while engaged in such employment.

The Court of Appeals gave three reasons for the ruling that the act was intended to be extraterritorial:

(1) "The act, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive contract between the employer and employee, general in its terms and unlimited as to territory, that the employer shall pay as provided by the act for a disability or the death of the employee as therein stated. The duty under the statute defines the terms of the contract."

(2) The intention of the Legislature is shown specifically by the definition of "employee," in section 3, subdivision 4, which includes a person engaged "in the course of his employment away from the plant of his employer."

"The language of the statute if construed literally, and we see no reason why it should not be, expressly includes the employee in this case, as he was engaged in his employment in New Jersey, away from the plant of his employer, and under the employer's express direction."

(3). The fact that the cost of insurance under the law is based upon the total payroll and number of employees, without deduction for such employees as are or may be engaged in employment



outside the state argues the extraterritorial application of the act.

" \* \* \* the fact that no provision is made for basing the insurance premium on employment within the state or in any way limiting the liability of the insurance carrier to injuries received in the state, shows that the act was passed without intending to limit the same to a contract for employment within the state."

The text of the Court of Appeals decision in *Post v. Burger & Gohlke* is as follows:

CHASE, J.: Burger & Gohlke, a corporation, is engaged in sheet metal work at Brooklyn, in this state, and for more than two years employed William Post, a resident of Brooklyn, as a sheet metal worker. The contract of employment was made in the state of New York.

On September 1, 1914, he was sent by his employer to perform certain sheet metal work on a grain elevator in Jersey City, state of New Jersey, and while engaged in his work on that day a sheet of metal slipped from his hands and he received an injury to his wrist, compensation for which has been awarded.

Burger & Gohlke secured compensation for injuries to its employees as provided by section 50 of the Workmen's Compensation Law, by insuring with the Employers' Liability Assurance Corporation, Limited.

An appeal to the Appellate Division was taken by the employer and the insurance carrier from the award made by the state workmen's compensation commission and the award was confirmed by that court. The only question involved on this appeal is whether the claimant, having received his injuries in the state of New Jersey and outside the boundaries of the state of New York, is entitled to compensation under the Workmen's Compensation Law.

If the claimant is only entitled to recover compensation for his injuries as for a tort, the general rule that an act of the legislature, unless otherwise shown, is not intended to apply outside of the boundaries of the state is applicable, and the award to him by the commission was erroneous. (*Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Goodwin v. Young*, 34 Hun, 252; *McDonald v. Mallory*, 77 N. Y. 546; *Story's Conflict of Laws*, §§ 18-20; *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316; *Liverpool & Great Western Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 448; *Gould's Case*, 215 Mass. 480.)

If it was the intention of the legislature to require that in every contract of employment in the cases provided by the act, there should be included and read into the contract the provisions of the act and that such provisions should be applicable in every case of injury wherever the employee is engaged in the employment, then the parties are bound thereby without reference to the place where the injury occurs. (*Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450; *Dike v. Erie R. Co.*, 45 N. Y. 113; *Strauss v. Union Central Life Ins. Co.*, 170 N. Y. 349; *Taylor v. N. Y. Life Ins. Co.*, 209 N. Y. 29; *Pache v. Oppenheim*, 93 App. Div. 221, 225; *People ex rel. Dusenbury v. Speir*, 77 N. Y. 144; *Liverpool & Great West. Steam Co. v. Phoenix*

*Ins. Co., supra*; *Kennerson v. Thames Towboat Co.*, 94 Atl. Rep. [Conn.] 372; *American Radiator Co. v. Rogge*, 92 Atl. Rep. [N. J.] 85; *S. C.*, 93 Atl. Rep. 1083; *Deeny v. Wright & Cobb Lighterage Co.*, 36 N. J. Law J. 121; *Rounsaville v. Central R. R. Co.*, 94 Atl. Rep. [N. J.] 392; *Davidheiser v. Hay Foundry & Iron Works*, 37 N. J. Law J. 119; *Perleburg v. Muller*, 35 N. J. Law J. 202; *Matter of Schmidt*, Bulletin of the Industrial Comm. of Ohio, vol. 1, No. 7, p. 21; *Schweitzer v. Hamburg Am. Line*, 149 App. Div. 900; *S. C.*, 78 Misc. Rep. 448; *Albanese v. Stewart*, 78 Misc. Rep. 581; *Wasilewski v. Warner Sugar Refining Co.*, 87 Misc. Rep. 156. See opinions written in this case 2 N. Y. State Dep. Rep. 461; 168 App. Div. 403.)

It is well settled that the legislature has the power, in a case like that now under consideration, to compel a contract between employer and employee that is extraterritorial in effect.

In determining the intention of the legislature in enacting the Workmen's Compensation Law of this state there are two important provisions of the act that must constantly be borne in mind as they affect and characterize all the other provisions of the act. 1. In the absence of substantial evidence to the contrary it must be presumed that the claim comes within the provisions of the act. (Workmen's Compensation Law [Cons. Laws, ch. 67], § 21.) 2. The liability of the employer for compensation includes every accidental personal injury sustained by the employee "*arising out of and in the course of his employment, without regard to fault as a cause of such injury.*" (Section 10.)

The act does not purport to provide compensation for a wrong. The compensation is given without reservation and wholly regardless of any question of wrongdoing of any kind. The act provides for compensation to employees which shall be payable generally for injuries sustained or death incurred in certain specified hazardous employments. (§ 2.) An employee as defined by the statute "means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; \* \* \*." (Section 3, subd. 4.)

Every employer subject to the provisions of the act shall pay or provide as required by the act for the "Disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment \* \* \*." (§ 10.) The language of the section from which the quotation is made is general and compulsory. It is further provided: "The liability prescribed by the last preceding section [§ 10] shall be exclusive, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury. \* \* \*" (§ 11.)

In case such an action is maintained in the courts for damages it is not necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow-servant nor that the employee assumed the risk of his

employment or that the injury was due to the contributory negligence of the employee.

It is provided that "the employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or be requested by the employee, during sixty days after the injury." (§ 13.) An injured employee is required if requested by the commission to submit himself to medical examination at a time and from time to time at a place *reasonably convenient for the employee*. (§ 19.) If a workman entitled to compensation under the act is injured or killed by the negligence or wrong of another not in the same employ an option is given to take compensation under this act or pursue the remedy against such other. If compensation is taken under this act the cause of action against such other must be assigned to the state for the purposes prescribed. (§ 29.)

An agreement for contribution by the employee toward the premiums paid or to be paid by the employer is void. (§ 31.) No agreement by an employee to waive his right to compensation is valid. (§ 32.) Claims for compensation shall not be assigned, released or commuted and are exempt from all claims of creditors. (§ 33.)

An employer is required to secure compensation to his employees in the way prescribed by the statute. (§ 50.) If he fail to comply with said section fifty he shall be liable to a penalty during which such failure continues, of an amount equal to the *pro rata* premium which would have been payable for insurance in the state fund for such period of non-compliance to be recovered in an action brought by the commission. (§ 50.)

It is also provided that failure to secure the payment of compensation shall have the effect of enabling the injured employee or his dependents to maintain an action for damages in the courts. (§ 52.)

An employer securing payment of compensation by contributing premiums to the said fund is thereby relieved from all liability for personal injuries or death sustained by his employees and a similar relief from liability is obtained by the employer by payment of the compensation by himself or an insurance carrier. (§ 53.)

The commission may cause the deposition of witnesses residing within or *without the state* to be taken in the manner prescribed by law for like depositions for civil actions in the Supreme Court. (§ 72.) The act provides that the employments shall be divided into groups and that "The commission shall determine the hazards of the different classes composing each group and fix the rates of premiums therefor based upon the *total pay roll* and number of employees in each of such classes of employment at the lowest possible rate consistent with the maintenance of a solvent *state insurance fund* and the creation of a reasonable surplus and reserve; and for such purpose may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each individual risk." (§ 95.)

Every employer who is insured in the state insurance fund shall keep a true and accurate record of the number of his employees and the wages paid by him and shall furnish to the commission upon demand, a sworn statement of the same. Such record shall be open to inspection at any time and as often as the commission shall require to verify the number of employees and the amount of the payroll. (§ 101.) Every employer shall

keep a record of all injuries fatal or otherwise received by his employees in the course of their employment. (§ 111.)

The only sections of the act that are claimed by the appellants as showing that it was not the intention of the legislature to give the act extra-territorial effect are section 2, subdivision 8, section 104 and section 114.

Section 2, subdivision 8, was doubtless drawn to avoid a conflict with the Federal Employers' Liability Act. The language of that subdivision should not be given an effect and meaning contrary to the general policy of the act as shown by reading it as a whole. Section 104 is the same in terms as it would have been had there been an express provision making a contract concededly applicable to employees in all parts of the world. Section 114 is one of limitation, intended to obviate a construction of the act violative of the Constitution of the United States. (*Matter of Jensen v. Southern Pac. Co.*, 215 N. Y. 514, 521.)

When the compensation act was passed the common-law rules relating to master and servant had become unsatisfactory, arising from the great increase in the number of persons employed in manufacturing and transportation and the changes in industrial conditions, and in the relation between employers and employees generally. It was claimed by many that the common-law rules had become obsolete, and that they were inequitable and unfair to the workingman. The difficulty under modern conditions of applying such common-law rules so as to work entire justice between employer and employee made a pronounced demand for some uniform system of compensation for injuries. The act was passed pursuant to a widespread belief in its value as a means of protecting workmen and their dependents from want in case of injury when engaged in certain specified hazardous employments. It was the intention of the legislature to secure such injured workmen and their dependents from becoming objects of charity, and to make reasonable compensation for injuries sustained or death incurred by reason of such employment a part of the expense of the lines of business included within the definition of hazardous employments as stated in the act. It was also the intention of the legislature to make such compensation not only a part of the expense of the business and a part of the cost of the things manufactured and of transportation as defined by the act, but ultimately to require such compensation to be paid by the consumer of the manufactured goods and by those securing transportation. (*Matter of Petrie*, 216 N. Y. 335; *Matter of Jensen v. Southern Pacific Co.*, *supra*.) The danger of injured workmen and their dependents becoming objects of charity is just as great when an accident occurs outside the boundaries of the state as it is when it occurs within the state. The interests of the state in its citizens is just as great in one case as in the other. The provisions in the act making the insurance of employers a part of the scheme and purpose of the act are to make certain that the compensation provided by the act will be paid. The failure to provide such insurance takes away in part the benefits that the employer receives pursuant to the act. The employer in this case assented to the contract of employment under the act to the extent of providing insurance with the insurance carrier. The act, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive contract between the employer and employee, general in its terms and unlimited as to territory,

that the employer shall pay as provided by the act for a disability or the death of the employee as therein stated. The duty under the statute defines the terms of the contract. (6 Ruling Case Law, 588; *Board of Highway Comrs. v. City of Bloomington*, 253 Ill. 164.)

Our conclusion as to the intention of the legislature is reached from the act as a whole. The intention is also specifically shown by the fact as already stated that an employee as defined by this act, includes a person engaged in the course of his employment away from the plant of the employer. The language of the statute if construed literally, and we see no reason why it should not be, expressly includes the employee in this case, as he was engaged in his employment in New Jersey, away from the plant of his employer, and under the employer's express direction.

It is also specifically shown by the fact that the cost of insurance is determined by ascertaining the number of *all the employees* of the employer and *the wages paid to them*. There is no provision in the act for ascertaining the number of employees of an employer engaged in employment within the state of New York nor is there any deduction from the amount to be paid for state or other insurance by reason of the fact, if true, that a portion of the employees of an employer are or may be engaged outside of the boundaries of the state. The provision in regard to insurance and the manner of ascertaining the premium for the same and the fact that no provision is made for basing the insurance premium on employment within the state or in any way limiting the liability of the insurance carrier to injuries received in the state, shows that the act was passed without intending to limit the same to a contract for employment within the state. The purpose of the legislature would seem to require that the act be read into every contract of employment and provide compensation for every injury incurred while engaged in such employment without limitation. The act requires insurance in general terms and is in terms applicable to injuries without limitation. The provisions in regard to the premiums are particularly important in view of the fact that the state becomes a party to the contract and requires that the premiums be paid to it, fixed upon the *total payroll and number of employees*.

The provisions of the Massachusetts Compensation Act mentioned in the *Gould Case* (*supra*), as showing an intention by the legislature of that state to confine its effect to accidents happening within that state, are not to be found in the act in this state. The reference to decisions under statutes permitting an action to recover damages for a wrongful act, neglect or default by which a decedent's death was caused is inapplicable except in other actions for a wrong, neglect or default. It has been urged that if the relation between the employer and employee under the act is deemed contractual, it should even then be held that the intention was to contract with reference to accidents within the state. As against this contention stands the general and comprehensive purpose of the act as stated. The decisions are quite uniformly against such claim of the appellants. The decisions in Connecticut and New Jersey to which we will call special attention are applicable to our statute. It may be said that there is an optional feature included in the statutes in those states. That fact goes only to the determination of the question whether the act shall be deemed a part of the contract between the employer and employee and it does not affect the

question whether if the relation of the employer and employee is construed as contractual it applies generally and without the bounds of the state. If the relation between the employer and employee is contractual the contract should be construed as binding upon both parties thereto without limitation as to territory the same as all ordinary contracts, based upon mutual agreement independent of statutory duty. (See *Bradbury Workman's Compensation* [2d ed.], 50.)

In *Kennerston v. Thames Towboat Co.* (94 Atl. Rep. [Conn.] 372) the court was considering the claims of personal representatives of deceased workmen. The workmen were at the time of their contracts of employment residents of Connecticut and they were employed in that state, but each lost his life by accident occurring while engaged in his employment outside the boundaries of the state. The court say: "The relation arising between these employers and employees was that of contract. Recovery was not dependent upon the fault of the employer but upon the terms of the contract made. \* \* \* If this proceeding were one to secure a recovery for a tort the place of the injury would determine the right of recovery \* \* \* It is not claimed, nor do we see how it could be with success, that a state may not provide that contracts of employment entered into without its bounds may include compensation for injury arising out of and in the course of the employment in another jurisdiction \* \* \*. Its intent was to afford protection to all Connecticut employers and employees who might voluntarily choose to make its provision for compensation for injury a part of its contracts of employment \* \* \*. If our act intends its contracts of employment to include compensation for injuries occurring only within our jurisdiction it manifestly defeats its own ends. In that case the employer *may not charge to the industry the compensation for injuries occurring without the state*, and the employee or his dependents may not collect the same. Neither employer nor employee can know what portion of this period of employment will be subject to the provisions of the act, and no provision for insurance of this liability will be practically possible, since it may not ordinarily be known what part of the service will be in and what part out of the state, or in what jurisdiction the service will be performed. \* \* \*"

The court, referring to the *Gould* case, say: "It may be well, however, to point out that the court does not state that its act is contractual in character \* \* \*. We have adopted a broader rule. We read our act in the light of the purpose, subject matter and history of the act to determine whether it expressly or by reasonable inference intended to include in its contract injuries without our jurisdiction." The recovery of the claimants was sustained.

In *Deeny v. Wright & Cobb Lighterage Company* (36 N. J. Law J. 121) the petitioner, a resident of Newark, New Jersey, was employed in Newark by a New Jersey corporation. His duties related to loading and unloading freight carried by boats running to and from said city. He was injured while engaged in his duties in the city of New York. The court held that the Workmen's Compensation Act of New Jersey applied to the case of the petitioner. In the opinion it is said: "The objects of our act are to protect the citizens and inhabitants of New Jersey. It is based upon the proposition that the inherent risks of an employment should, in justice, be placed

upon the shoulders of the employer, who can protect himself by an addition to the price of his product, and so cause the burden ultimately to fall upon the consumer."

Referring to the act it is said: "It appears that there is an implied contract to compensate for injuries arising out of and in the course of the employment and under it all other methods and rights to any other form of compensation are relinquished. The statute can have no extraterritorial effect, *but it can require a contract to be made by two parties to a hiring that the contract shall have an extraterritorial effect.* The contract is binding upon the employee himself and upon the employer, and it is conclusively presumed that the parties have accepted" its provisions and have agreed to be bound thereby.

In *Rounsaville v. Central Railroad Co.* (94 Atl. Rep. 392) a person was employed in New Jersey as a brakeman. He was injured in Pennsylvania. There is no question but that he was engaged in interstate commerce. Held, that the claim of the employee should be sustained and that the Federal Employers' Liability Act is applicable only to liability in tort for negligence while the Workmen's Compensation Act in New Jersey "is contractual, and, while the contract liability is implied from silence, either party is at liberty to adopt or reject the statutory contract \* \* \*. The liability of the employer depends not on any fault of his own or his servants, but on whether, by act or by silence, he has adopted the statutory terms. The amount of his pecuniary liability is fixed by statute and not by the verdict of a jury."

Referring to the question of the extraterritorial effect of the act, the court say: "We are now dealing with the simpler question, whether a New Jersey court will enforce a New Jersey contract, according to the terms of a New Jersey statute. The question hardly calls for an answer. The place where the accident occurs is of no more relevance than is the place of accident of the assured, in an action on a contract of accident insurance, or the place of death of the assured, in an action on a contract of life insurance."

The courts of this state have recognized the compensation laws of other states and countries and give effect to such laws unless they are contrary to the laws or policy of this state. (*Schweitzer v. Hamburg Am. Line*, 149 App. Div. 900; *S. O.*, 78 Misc. Rep. 448; *Albanese v. Stewart*, 78 Misc. Rep. 581; *Wasilewski v. Warner Sugar Refining Co.*, 87 Misc. Rep. 158. See *Wooden v. Western N. Y. & P. R. R. Co.*, 126 N. Y. 10; *Dennick v. Railroad Co.*, 103 U. S. 11.)

We appreciate that any determination that may be made of the question under consideration will result in some practical difficulties in administering the statute, but the difficulties that will be met with in administering the statute construed as requiring a contract binding upon both parties without limitation will be less burdensome than the difficulties that would be experienced with a contrary construction of the statute. The practical difficulties that may be met in administering the statute as herein construed can be substantially overcome by adopting rules for the commission or perhaps by further legislation. The order should be affirmed, with costs.

WILLARD BARTLETT, CH. J., HISCOCK, COLLIN, CARDOZO, SEABURY, and POUND, JJ., concur. Order affirmed. *Post v. Burger & Gohlke*, 216 N. Y. 544, Jan. 11, 1916.

The Appellate Division and the State Industrial Commission have drawn certain lines, however, in the matter of extra-territoriality. The former has reversed an award to the dependents of an employee killed in Pennsylvania because his contract of employment, though made in New York, related solely to work to be performed outside of New York. The latter has denied compensation to the widow of an employee killed in West Virginia because he did not reside in New York, though his contract of employment had been made there. These two cases have been presented above, pp. 153-158. Since the Court of Appeals has not passed upon them the subject of the extra-territoriality has not been thoroughly defined as yet.

The Post case had been decided in the Appellate Division in conjunction with two other extra-territorial cases, *Spratt v. Sweeney & Gray Co.* and *Valentine v. Smith, Angevine & Co., Inc.* A single opinion had been written for the three cases. On its opinion in the Post case, the Court of Appeals affirmed the awards in the Spratt and Valentine cases (216 N. Y. Rep. 763). The text of the Appellate Division's opinion, together with a dissenting opinion of Presiding Justice Smith, is as follows:

KELLOGG, J.: The injuries sustained by the employees making these three claims resulted from accidents which occurred in the State of New Jersey, except in the case of Valentine (*supra*), where the accident occurred in the State of Connecticut. The claimants are all residents of this State, where the employers are engaged in business, and where the several contracts of employment were presumably made. All injuries were sustained in the ordinary course of employment. The State Workmen's Compensation Commission has made the usual awards of compensation, and the only question presented by these appeals is as to whether the Workmen's Compensation Law of this State has extraterritorial effect so as to allow compensation for accidents occurring in other States.

In *Matter of McQueeney v. Sutphen & Myer* (167 App. Div. 528), decided at this term of court, we considered the provision of the Compensation Law declaring a presumption that the case of an injured employee is within the law and found the presumption reasonable from the fact that the premium for insurance is based upon the payroll of the employer, the number of employees and the hazards of the different classes comprising each group, that the statute, by basing the amount to be paid into the fund upon the payroll and the number of employees, contemplates that an employee while at work is engaged or may be considered as engaged all the while in the hazardous employment.



The same reasoning applies to this case. The employer is carrying on his business in this State and the premiums required to be paid by him are based upon the assumption that each of the employees who are engaged in and about his business are insured all the time they are acting within the course of their employment. The fact that an employee may from time to time be outside of the State in the course of his employment does not diminish the amount of premiums to be paid. The employer has paid for the insurance of his employee for all the time he is engaged in his work and is entitled to the benefit of that insurance. The risk outside of the State is no greater than in the State and it is immaterial to the insurer where the accident occurred, so long as it occurred in the business he had insured and during the time covered by the insurance. The fact, therefore, that the employer's contribution to the fund is based upon the payroll and the number of men employed, without regard to the fact that from time to time some of them work outside of the State, emphasizes the fact that it is immaterial whether the injury took place within or without the State so long as it occurred in the course of his employment, and gives emphasis to the provision of subdivision 4 of section 3 of the act defining an employee as "a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer." The time and earnings of the injured employee, while temporarily working outside of the State, will be represented in the employer's contribution to the fund.

The scheme of the statute is, in brief, to charge upon the business, through insurance, the losses caused by it, making the business and the ultimate consumer of its product, and not the injured employee, bear the burden of the accidents incident to the business. The statute contemplates the protection, not only of the employee, but of the employer at the expense of the ultimate consumer. (See *Matter of Winfield v. N. Y. C. & H. R. R. Co.*, 168 App. Div. 351, decided at this term.) The employee cannot refuse to do the master's bidding within the course of the employment upon the grounds that it requires him to pass over the State line and the law cannot contemplate that he shall lose the benefit of the act because he is performing the duties of his employment. The statute must have a broad and liberal interpretation to protect the employee and to compensate him for all injuries received in the course of the employment and to charge upon the fund or the insurer the loss which otherwise must fall upon the master. By complying with the act the employer is guaranteed protection and the moneys which he has paid into the fund or secured to be paid must bear the losses which they were intended to meet, otherwise the employer and the employee are suffering at the hands of the State.

In the *McQueney* case and the *Winfield* case we considered that the self-insurer or the employer who insured otherwise than in the State fund has no advantage or disadvantage in the construction of the statute from the fact that he insured otherwise than in the State fund. The law contemplates equality and that all employees and employers shall be measured by the same rule without regard to the particular manner in which the insurance is carried.

The award should be affirmed.

All concurred, except SMITH, P. J., dissenting, in opinion.

SMITH, P. J. (dissenting):

I am unable to find in the act itself any clear expression of intent as to its precise scope territorially. The definition of "employee" in subdivision 4 of section 3 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) as including a person engaged in working "in the course of his employment away from the plant of his employer," literally includes a workman no matter at how great a distance from the plant he may be working; and yet seems too weak an expression in form to cover employment anywhere in this or a foreign country. The Ohio Compensation Act, which has an admitted extraterritorial scope, uses the much stronger expression, "*whosoever* such injury has occurred." (Laws of 1913, p. 79, § 21.) Section 114 seems to exclude from the operation of the act workmen within the State engaged in intrastate and interstate commerce who are subject to Federal legislation, and group 8 of section 2 includes the operation and repair of certain vessels "within or without the State." It is urged that this last clause assumes that the act as a whole excludes work performed without the State, as otherwise this clause would be clearly unnecessary.

We are met at the start by the argument that our former statutes permitting recovery of damages for death by negligence, and the old employers' liability acts have always been held not to be extraterritorial. The death or injury must have occurred within this State to allow recovery upon such a statute, although if a similar statute of a foreign jurisdiction were proved, then by comity recovery could be had in this State, upon such foreign statute, the law of this State applying simply in matters of procedure and detail. (*Kiefer v. Grand Trunk R. Co.*, 12 App. Div. 28; *affd.* on opinion below, 153 N. Y. 688; *Johnson v. Phoenix Bridge Co.*, 133 App. Div. 807, as modified by 197 N. Y. 316.) If, then, the act in question is similar to the two classes of statutes cited it would follow that there is a strong presumption against its extraterritoriality. Consequently, if there are compensation acts similar to our own in both New Jersey and Connecticut, for instance, the laws of such States could be enforced by our courts for accidents occurring in such States, but no recovery could be had under our own statute for such accidents. If, on the other hand, our Compensation Act creates merely a contractual relation between employer and employee it would seem to follow that a recovery might be had in this or any other State under this act, no matter where the injury might occur. (See *Dike v. Erie R. Co.*, 45 N. Y. 113.)

This question is not free from doubt and the decisions are conflicting. I think, however, that the basis of recovery provided for by this act is more in the nature of a tort, such as was the basis of recovery under the old death and employers' liability acts, than of a mere contractual obligation. The liability created is thus imposed by law upon the parties, so that the contract, if any there be, is not one freely entered into, such as are ordinary contracts of insurance. The act is a compulsory one in this State. It is a general principle that the statutes of a State do not operate as to injuries which may be suffered by its citizens beyond its borders. This is a rule of statutory construction merely, in order to avoid conflict with the

foreign *lex loci* and the double liability which would otherwise result. "*Prima facie* all laws are co-extensive, and only co-extensive with the political jurisdiction of the law-making power." (See *Whitford v. Panama Railroad Co.*, 23 N. Y. 465, 470, 471.) It is of course admitted, as was laid down by Judge DENIO in the case cited, that it is "within the competency of the Legislature to declare that any wrong which may be inflicted upon a citizen of New York abroad may be redressed here according to the principles of our law." The only question now is whether, in this instance, the Legislature can be deemed to have done so when the courts have uniformly held that the various acts mentioned did not have any extraterritorial effect. In a recent case before the Supreme Court of Minnesota it appeared that the plaintiff entered defendant's employment in that State, but was working in the State of Wisconsin at the time he was injured. The defendant had elected to accept the provisions of the Wisconsin Workmen's Compensation Act, and it was held that the plaintiff's right to damages or compensation depended upon the law of Wisconsin where the injury occurred. Judgment for the defendant was affirmed. The court held, "But, although plaintiff's cause of action is predicated upon his relation of a servant to defendant, and the latter's obligations as master, it is, nevertheless, one in tort. As to such actions, the law is well settled that the liability or right of action is determined by the law of the place where the injury is inflicted, without regard to the law of the forum or the law of the place where the contract was made. [Authorities cited.] This eliminates from consideration the law of the place where the contract of employment was made in determining what redress plaintiff may have for the injuries received when working for defendant in Wisconsin. Plaintiff must resort to the law as it is in that State to find his right to relief." (*Johnson v. Nelson*, 150 N. W. Rep. 620.)

In the leading case of *Matter of Gould* (215 Mass. 480), involving an injury sustained outside the State of Massachusetts, the court said: "In the absence of unequivocal language to the contrary, it is not to be presumed that statutes respecting this matter are designed to control conduct or fix the rights of parties beyond the territorial limits of the State." The Massachusetts Compensation Act contained no express statement of its territorial limitations, but did contain certain provisions that indicated an intent that it should not apply to accidents without the State, and the court so held. This case gives us little assistance on account of the special features of the Massachusetts act. Compensation acts have also been held to have no extraterritorial effect in Great Britain (*Tomalin v. S. Pearson & Son*, 100 L. T. Rep. 685; *Schwartz v. India Rubber, Gutta Percha & Telegraph Works Co.*, L. R. [1912] 2 K. B. Div. 299; *Hicks v. Maaton*, 124 L. T. Jour. 135; 1 Butt. W. C. C. [N. S.] 150), Michigan (*Keyes Davis Co. v. Allerdyce*, Michigan Industrial Accident Board, April, 1913), and Wisconsin (Ruling of Industrial Commission). See, also, Harper on the Law of Workmen's Compensation in Illinois (127 *et seq.*), where the opinion is given that the Illinois act, on account of special features, is not extraterritorial in its application, thus in effect following the reasoning of the *Gould* case cited.

In the following cases extraterritorial effect has been allowed: (N. J.) *Deeny v. Wright & Cobb Lighterage Co.* (Essex Common Pleas, 36 N. J. L.

J. 121); (Ohio) *Matter of Edward Schmidt* (Claim No. 6, Ohio State Liability Board, award July 10, 1912, opinion of Attorney-General, March, 1914); (Conn.) *Matter of Welton v. Waterbury Rolling Mill Co.* (opinion by Compensation Commissioner, Nov. 5, 1914). Reference may also be made to the valuable article in Bradbury's *Workmen's Compensation Law* (Vol. 1 [2d ed.], p. 34 *et seq.*), in which the author reviews the decisions and favors the view that these acts in general should be construed as applicable to accidents occurring outside of the various States of their enactment, upon the ground that the liability created is essentially contractual in its nature.

With the weight of authority against the extraterritoriality of these acts, I do not feel justified in giving to this act an extraterritorial scope in the absence of a plainly declared intent to such effect in the act itself. If the Legislature did have such an intent in enacting this statute, it should have been more clearly expressed in the provisions of the act. The act radically changes the former statutory and common-law liability for industrial accidents and consequently must be construed strictly.

The several awards of the Commission should be reversed.

Award affirmed. *Spratt v. Sweeney & Gray Co.*, 168 App. Div. 403, May 7, 1915.

The earliest of the above cases, that of *Valentine v. Smith, Angevine & Co., Inc.*, was the subject of an unusually lengthy opinion by the Workmen's Compensation Commission which foreshadowed the points developed in the later court opinions, S. D. R., vol. 2, pp. 460-471. Other Commission awards for extra-territorial injuries have been published in S. D. R., vol. 4, pp. 390, 408; vol. 5, p. 409, vol. 6, p. 325; vol. 7, p. 383.

The question of compensation for the accidental injuries of employees was subject to adjudication in the courts of New York before the enactment of its compensation legislation. The courts were called upon to enforce foreign compensation laws on behalf of employees temporarily coming into the State. The following cases of the kind, occurring in 1912-1914, are of interest: *Schweitzer v. Hamburg American Line*, 78 Misc. 448; 149 App. Div. 900; *Albanese v. Stewart*, 78 Misc. 581; *Pensabene v. Auditore Co.*, 78 Misc. 538; 155 App. Div. 368; *Wasilewski v. Warner Sugar Refining Co.*, 87 Misc. 156. An employee residing in New Jersey and making his contract of employment in Pennsylvania has been granted compensation by the New York State Industrial Commission for an injury incurred in New York City; *Griffiths v. American Bitumastic Enamel Co.*, S. R. D., vol. 8, p. 429, April 4, 1916.

*h. The injured employee is an independent contractor acting incidentally at time of the accident as an employee.*— Even an independent contractor acting incidentally as an employee may have compensation. In *Powley v. Vivian & Co.*, the full text of which appears above, p. 70, Powley was shown to have been acting as a mere employee at the time of, and under the circumstances of, the accident, though an independent contractor in his main and ordinary relationship with the company from which he claimed compensation. He was doing dredging work with his own dredge boat under a contract with Vivian and Company but received his injury while operating a motor boat belonging to the company, in performance of a duty of the company. The Appellate Division's ground for affirming the award was stated as follows:

However, at the time of sustaining the injury the claimant was not engaged in the specific work of managing the operation of the dredge. He was necessarily, he says, transporting supplies to the dredge when he sustained the injury. Vivian Co. was obligated by the agreement to furnish these supplies. The launchman was its employee, and it was its duty to furnish a man to run the launch. In performing that duty Vivian Co. failed, and as the claimant says, "I had to get the supplies myself." In the performance of that act the claimant is to be regarded, not as an independent contractor, but as an employee, within the intent of the Workmen's Compensation Law.

"One who has an independent business, and generally serves only in the capacity of a contractor, may abandon that character for a time, and become a mere servant or agent, and this, too, without doing work of a different nature from that to which he is accustomed. \* \* \* And he may even be a contractor as to part of his service, and a servant as to part." (S. & R. Neg. [6th ed.] § 165.) Where an independent contractor had finished a building, it was held that in throwing waste material from the roof he was acting as the servant of the owner. (*Swart v. Justh*, 24 App. D. C. 596.) *Powley v. Vivian & Co.*, 169 App. Div. 176, July 1, 1915.

*i. The injury consists in infection or disease resulting from the accident.*— Even when the injury consists in resultant infection or disease the injured employee may have compensation. Section 3, subdivision 7, of the Workmen's Compensation Law reads as follows:

"Injury" and "personal injury" mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.

Occupational diseases as such are not covered by this definition but only "such disease or infection" as results from "accidental injuries." The accident may be trivial and harmless in itself; the resulting disease or infection may bring permanent disability or death. The subtle connections of accidental injury with ensuing infection or disease would seem to offer a wide and varied field for controversy as to facts. Only one or two of the numerous commission cases involving resultant disease or death have reached the courts by appeal.

In *Carroll v. Knickerbocker Ice Co.*, referred to above, p. 116, in connection with the question of intoxication and appearing in full under the subject of evidence, pp. 367-374, 380-388 below, there was a question whether the delirium tremens of the employee resulted from an accidental injury or from alcoholism. In the following case, the opinion of which is written by Justice Woodward, who wrote the vigorous dissenting opinion in the Carroll case, the Appellate Division thoroughly goes into the subject and affirms an award to the dependents of an employee whose injury resulted in death from delirium tremens:

WOODWARD, J.: The award should be affirmed. There is not such a deficiency in the medical proof connecting the injury with the death of the injured employee as to warrant this court in disturbing the determination made by the State Industrial Commission.

Michael Sullivan, whose dependents are the present claimants, was admittedly a time-worker in the employ of the Industrial Engineering Company. On July 25, 1915, he died in the Harlem Hospital, to which he had been admitted five days before. During his illness at the hospital the injured worker was delirious much of the time, and was probably suffering from delirium tremens. The immediate cause of death was certified and testified by the attending physicians from the hospital to be "lobar pneumonia, alcoholic poisoning."

The "employer's first report of injury," dated three days before the death, described "how the accident occurred" as follows: "While pulling centers a piece of 3x8 fell on shoulder. According to report of fellow-workman." The timekeeper's report added that "this information was received from H. Couton. The injured did not report any injury. According to H. Couton accident occurred several days before he (Couton) reported it to us."

The uncontradicted testimony of Hypolite Couton and Frank Hicks, fellow-employees, before the Commission, showed clearly that late in the afternoon of the Friday before the Tuesday on which he was taken to the Harlem Hospital, Sullivan met with an injury which arose out of and befell him during and by reason of his employment. With other workmen he was on a scaffold in the new plant of the Ford Motor Car Company in Long Island City, in the act of taking down the timbers which constituted the "form" in which the concrete of the flooring above had been placed and had "set."

A timber three by eight inches in size, whose length was described as from eight to sixteen feet, fell from the ceiling, a distance of twelve or fourteen feet, and hit Sullivan on or near the left shoulder. It also hit the witness Hicks at the same time. The impact of the timber, made more heavy by the moisture from the concrete, knocked Sullivan down. Almost immediately he began to complain of severe pains in the shoulder. He sat down for awhile, and "then he got up again and tried to work and he couldn't use the arm very good, because in such cases you have to use both hands." The next day he reported for work, still complaining of pains. He remained up to twelve o'clock, and "worked, but he didn't do much." None of the witnesses obviously available to contradict this testimony, if the same were untrue, was called by the employer or insurance carrier.

The decedent's wife testified that he came home Friday evening and complained of pain, saying that he had been struck by a plank that day. Home remedies and treatment were administered. The next morning he returned to work, despite his wife's entreaties. At two o'clock he came home and went to bed. That night, Sunday and Monday, he was in bed, and continued to complain of pains in the arm, shoulder and side. Monday morning a homeopathic physician was called, who gave him some unidentified pills. On Tuesday the patient was evidently suffering also from some sort of delirium or alcoholism. The deceased had been in the habit of drinking moderately of beer, but just prior to the accident he does not seem to have been indulging in liquor to any appreciable extent. As his condition grew worse his wife despaired of her ability to keep him in doors, although his arm hung limply at his side. She enlisted the aid of a policeman in obtaining an ambulance, and he was taken to the Harlem Hospital.

The ambulance surgeon testified that he found the patient "weak and somewhat irrational," and so ordered his removal to the hospital. "He had his left arm paralyzed, and he was seeing things about the room, so his family said. \* \* \* He had a temperature of 100 and I admitted him as delirium tremens and alcoholic neuritis." Neither Dr. Rosenbluth, the ambulance surgeon, nor Dr. Rafsky, the attending physician, called to the stand by the insurance carrier, had any independent knowledge or recollection of the case. Their testimony was based wholly upon the hospital records and the notations made by them at the time. Neither seems to have received any information, or to have observed any evidence, that the patient had received any blow or injury. The patient told the surgeon that "his arm was painful and paralyzed," but he was treated only for the lobar pneumonia and for the effects of the alcoholism or tremens. When his wife visited the hospital he complained of pain in his shoulder.

Dr. Stile, the homeopath, who prescribed pills on July nineteenth, was not called to the stand by either side. Dr. Rafsky was cross-examined as to the adequacy of the accident as a producing cause of the conditions found when the patient was admitted to the hospital. For example, the following testimony was given by Dr. Rafsky on cross-examination: "Q. Supposing I told you that on the 18th of July a plank 3 by 8 fell on this man's shoulder,—somewhat heavy. That could cause a neuritis with a real paralysis of that arm if it fell on the proper place. Supposing it did and caused a paralysis of the nerve, would that cause that condition? A. Yes, it might. Q. And it would be more probable than an alcoholic hemiplegia

or a monaplegia? A. Yes. Q. I am supposing that it did occur? A. Yes. Q. And you overlooked it even though it didn't show any ecchymosis, and you would never think of it? A. Yes, the man would lay in that condition and not complain and I wouldn't know about it. \* \* \* Q. What was the lobar pneumonia due to? A. Lowered resistance. \* \* \* Q. \* \* \* Assuming the man had sustained an injury resulting in the condition described here, would that have caused this man's death or contribute to it? A. The injury alone wouldn't, it may contribute."

Upon the whole record I think the Commission was acting within the evidence and its reasoned impressions of the circumstances and causes of death in reaching the conclusion lucidly expressed by Commissioner Mitchell: "As a matter of fact delirium frequently follows an injury. A man need not be a hard drinker to become delirious after an injury. Men who are very moderate drinkers become delirious shortly following an injury. We have cases like this day after day. We have had doctors here and they agree that a man who is a moderate drinker may become delirious following not a very severe injury, and where the man dies in delirium and the immediate cause of his death was delirium tremens, and yet the cause of his delirium was the accident, the cause of his death was the accident."

The proof submitted in behalf of the dependent claimants at bar seems fairly to authorize and sustain the award made. The testimony on medical phases leaves something to be desired, but cannot be regarded as insufficient in a substantial sense. Taken in connection with the statutory presumptions arising under section 21 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), the validity and propriety of the award, as against judicial interference, is clear. There is here involved none of the evidentiary questions passed upon in *Matter of Carroll v. Knickerbocker Ice Co.* (169 App. Div. 450), upon which I retain the views expressed in the dissenting opinion in that case. The canons of proof and presumption laid down in *Matter of Collins v. Brooklyn Union Gas Co.* (171 App. Div. 381) have here been fully met. That the deceased was in the employ of the insured employer is admitted. That he received serious injury arising "out of and in the course of" that employment (Workmen's Compensation Law, § 10) is shown by the testimony of two eye-witnesses, is not contradicted, and is confirmed by the employer's own report. That this injury and its effects led on directly and in causal relation to the conditions which brought about death is shown by the testimony of the ambulance surgeon, the hospital physician, and the widow, as witnesses to the facts, and by the admissions of the hospital physician, testifying as an expert on cross-examination, after he had been called in behalf of the insurance carrier. The presumptions created by section 21 of the Workmen's Compensation Law are accordingly operative, in the absence of substantial evidence to the contrary. It would have been preferable that the claimants or the insurance carrier should have made available to the Commission the testimony of Dr. Stile. An adjournment was in fact granted to the insurance carrier to enable its representative to do this, but no appearance was made on the adjourned date. The insurance carrier would have done well to have produced this physician, whose testimony might have been of moment. The question whether, under the circumstances, the privilege created by section 834 of the Code of Civil Procedure would have barred him from testifying,



if called in behalf of the insurance carrier, is not here passed upon. The Commission would have done well to have held the proceeding open until Dr. Stile's presence had been procured or his absence explained. The unexplained absence of Dr. Stile's testimony, however, can hardly be deemed "substantial evidence" overcoming the statutory presumptions and the testimony actually offered. Acceleration of death from delirium tremens, through an injury bringing on or aggravating the condition of alcoholism or tremens, has been held to sustain liability for the death as produced by the injury both in tort actions and under the compensation statute. (*McCahill v. New York Transportation Co.*, 201 N. Y. 221; *Matter of Carroll v. Knickerbocker Ice Co.*, 169 App. Div. 450; *Matter of Winters v. New York Herald Co.*, 171 id. 960.) Therefore, even if the element of lobar pneumonia or weakened resistance, due to the impact of the water-soaked timber, be laid aside and the theory of death from delirium tremens accepted, the causal connection is sufficient under the authorities, and the award is not made under circumstances giving this court right or reason to reverse or remand. The Commission was within its discretion in concluding that "the injury to the left shoulder was the cause of the delirium tremens and development of lobar pneumonia, and was the cause of his death."

The award should be affirmed. Award unanimously affirmed. *Sullivan v. Industrial Engineering Co.*, 173 App. Div. 65, May 3, 1916.

In *Dunn v. West End Brewing Co.*, S. D. R., vol. 5, p. 380, July 26, 1915, an award was made to the dependents of a driver injured by a beer keg which rolled from his wagon and taken to a hospital where he died of alcoholic meningitis and delirium tremens. The Appellate Division, by decision without opinion affirmed this award, June 30, 1916. In *Winters v. New York Herald Co.*, 171 App. Div. 960, November, 1915, the Appellate Division unanimously and without opinion affirmed an award of death benefits in the case of a printer who slipped on the press room floor and struck his head, the injury resulting in delirium tremens and death. In *Bridgeman v. McLoughlin*, S. D. R., vol. 7, p. 425, February 9, 1916, an award was made to the dependents of a driver injured by the crank of an automobile truck and taken to a hospital where he died of cerebral oedema and delirium tremens.

The award of the Commission for the peculiarly complicated accident of a hoist runner who jumped into a river to escape being struck by a broken timber and thereby contracted a cold that developed into pulmonary tuberculosis has been unanimously affirmed by the Appellate Division in the following opinion:

KELLOGG, P. J.: The Commission has found that the claimant, September 3, 1914, was working for his employer on the Mohawk river operating a

crane; one of the timbers of the crane broke, and to save himself from being hurt he jumped into the river, a distance of some ten feet. The water came up to his knees. He waded to the shore, contracted a heavy cold and pleurisy, which developed into pulmonary tuberculosis, by reason of which he was disabled from the date of the accident until February 25, 1915, and since that date.

The finding of the Commission that claimant's present condition is the result of the accidental breaking of the timber, and that his going into the river resulted therefrom, is not unreasonable, and has some evidence to sustain it. We cannot question it. While the claimant jumped into the water, he did so to prevent a personal injury resulting from the accidental breaking of the timber. The jumping into the river was, therefore, not a voluntary act, but was the result of the accident, which put the claimant in such peril that his getting wet must be considered accidental rather than voluntary.

Subdivision 7 of section 3 of the Workmen's Compensation Law defines "injury" and "personal injury" to mean "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." We consider the claimant in the same position as if the accident had thrown him into the river, and clearly his being accidentally thrown ten feet into the water was an injury within the meaning of the act, and the disease following has been found to naturally and unavoidably result from that injury. He at the time apparently was not physically disabled by jumping into the water, and it was not then quite clear what injury he had sustained; but it has developed that the injury was very serious. The award should, therefore, be affirmed.

Award unanimously affirmed. *Rist v. Larkin & Sangster*, 171 App. Div. 71, January 5, 1916.

The Commission has awarded compensation for death of a railroad section hand from bronchitis and congestion of the lungs as a result of illness due to ivy poisoning, *Plass v. Central New England R. Co.*, S. D. R., vol. 4, p. 331; 169 App. Div. 826, the text of which case appears above, p. 205; for death of an electrotype finisher from angina pectoris due to exhaustion from prolonged over-exertion, *McMurray v. Little & Ives Co.*, S. D. R., vol. 3, p. 395; for insanity of an elevated railway motorman caused by the shock of a collision, *McMahon v. Interborough R. T. Co.*, S. D. R., vol. 5, pp. 371, 374; for infection in the finger of a cloak model due to the prick of a pin while she was trying on an unfinished garment, *Bloomfield v. November*, S. D. R., vol. 5, p. 385, unanimously affirmed without opinion, 172 App. Div. 917; for infection in a laceration on the head of a subway worker caused by the falling of a beam, *Petcheck v. Degnon Contracting*

*Co.*, S. D. R., vol. 6, p. 394; for anthrax contracted by a trimmer of skins in a tannery through an accidental abrasion in his cheek, *Henry v. Levor & Co.*, S. D. R., vol. 6, p. 388; for death of a street railway process server from gangrenous diabetes resultant from a fellow passenger treading upon his toes while he was returning to the office on one of his employer's cars, *Brown v. Richmond Light & R. R. Co.*, S. D. R., vol. 7, pp. 371, 420; for death of a driver from tetanus as a result of a wound in the foot by a rusty nail, *Putnam v. Murray*, S. D. R., vol. 6, p. 355; vol. 7, p. 407; 174 App. Div. 720, Sept. 13, 1916; and for death of a car shop employee from endocarditis with nephritis hastened by a blow in the abdomen, *Cook v. N. Y. C. & H. R. R. Co.*, S. D. R., vol. 8, p. 469.

Of these awards, the Court of Appeals has reversed that in *Bloomfield v. November* because the Commission stated no grounds for excusing the claimant's failure to give notice of the accident, and the Appellate Division has reversed that in *Brown v. Richmond Light and R. R. Co.* because the claimant was merely a passenger and was performing no duties by way of operating the car. The full text of the Court of Appeals' reversal appears below, p. 390, and of the Appellate Division's reversal, above, p. 151.

The Commission, on ground of the lack of evidence, has denied benefits to widows for the deaths of their husbands from the following diseases: blood poisoning claimed to have been due to rupture of the mucus membrane inside of the nose, permitting the entrance of germs, the rupture having been caused by an accidental blow from a container, *Partridge v. Norwich Pharmaceutical Co.*, S. D. R., vol. 6, p. 336; tubercular trouble claimed to have been hastened by the fracture of a leg, *Cappelli v. Cranford*, S. D. R., vol. 6, p. 349; intestinal ulcers claimed to have been caused by crushing of the body against a truck, *Hyland v. Winant*, S. D. R., vol. 6, p. 304; lobar pneumonia claimed to have been due to weakness caused by the amputation of a finger, *Stanley v. Wood & Dolson Co.*, S. D. R., vol. 6, p. 383; and a paralytic stroke or an embolism claimed to have resulted from severe vibration of a compressed air drill, *Mohr v. Cranford*, S. D. R., vol. 7, p. 376. The Appellate Division affirmed the denial in the *Partridge* case, November 29, 1916.

j. *The injury consists in hernia.*—Straining, blows and other accidents resulting in hernia or aggravating previously existing conditions of hernia are compensatable. Hernia sometimes presents difficulties of evidence as do disease cases, and calls for the testimony of surgical experts, the doubt being whether the hernia is traumatic or not. The Appellate Division has affirmed awards in two cases of hernia, unanimously and without opinion: *Ulrich v. Lenox Coat, Apron and Towel Supply Co.*, S. D. R., vol 3, p. 380, February 26, 1915; 171 App. Div. 958, November 10, 1915; *Mooney v. Weber Piano Co.*, S. D. R., vol. 5, p. 396, August 11, 1915; 172 App. Div. 917, January 18, 1916.

The Commission has made awards for hernia in *Staab v. American Malting Co.*, S. D. R., vol. 7, p. 374, January 13, 1916; and *Krenzien v. Jasper*, S. D. R., vol. 7, p. 373, January 13, 1916. For references to other awards, see under "The 'Other cases' paragraph," below, p. 306.

k. *The injured employee has made false statements in obtaining his employment.*—The State Industrial Commission may award compensation to an injured employee who has made false statements to procure his employment. A street railway conductor, discharged by one company for failure to ring up fares, obtained employment with another. After working upwards of three months with the second company he lost his life by an accident in the course of his work. The employer alleged that the written application by which he had procured his employment had falsely stated that he was unmarried and had not been previously employed on a railroad. The court held that, even if he had made such false statements, it ought to affirm the award. It quoted precedents for its position. The opinion is as follows:

LYON, J.: This is an appeal permitted by section 23 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1913, chap. 816, re-enacted and amd. by Laws of 1914, chap. 41, and amd. by Laws of 1914, chap. 316) by the Union Railway Company from a decision and award of the State Workmen's Compensation Commission awarding compensation to the widow and two children of John J. Kenny, deceased.

Deceased, who had been working for upwards of three months as a conductor upon an electric street surface car of the Union Railway Company, sustained accidental injuries, September 21, 1914, resulting in his death that day. The railway company, which was its own insurance carrier, contested its liability to make payment of the award upon the ground that

the relation of employer and employee did not exist between the company and deceased at the time of the happening of the accident, for the reason that the deceased had made written application for employment by said railway company in May, 1914, by aid of which he had obtained employment, in which application he had falsely and fraudulently stated, in violation of section 939 of the Penal Law, that he was unmarried, and had not been employed on any railroad. Concededly deceased, at the time of making such application, was married and had two children, and had been employed by the Yonkers Railroad Company as a conductor from January, 1912, until the spring of 1913, a period of about one year and two months, and had been discharged by that company for failure to ring up fares. Section 939 of the Penal Law provided, so far as material to be considered here, that "A person who obtains employment \* \* \* by \* \* \* aid \* \* \* of any false statement in writing, as to his \* \* \* previous employment \* \* \*, is guilty of a misdemeanor." The railway company conceded upon the hearing before the Commission that in employing men it made no distinction between married and single men, and that it would not have rejected deceased had he stated that he was a married man, but its counsel stated upon the trial that had the company known the facts, it would most likely have rejected him for saying that he was single when he was married; and one of the superintendents of the railway company testified that it would not have employed deceased had it known that he had been employed by the Yonkers Railroad Company and discharged.

The counsel for the railway company offered in evidence applications claimed by said counsel to have been made by decedent to the Yonkers Railroad Company and to the Union Railway Company. The examination made by the members of the Commission of the alleged signatures of decedent to both instruments, photographic copies of which applications are contained in the record, fully justified the doubt expressed by the chairman of the Commission as to the signatures having been made by the same man, and hence warranted the Commission in holding as matter of fact that the contestant had not satisfactorily established the making by decedent of the alleged application containing the false statements. Such holding would of itself have justified the Commission in disregarding the objections made by the railway company to the allowance of compensation to the widow and children of deceased, and would have been conclusive. Passing this, however, and conceding that the false statements were in fact made by the deceased, we think the award should be confirmed.

There is no merit in the contention of the railway company that it was not an employer and the deceased not an employee within the meaning of the Workmen's Compensation Law at the time he received the fatal injuries. Section 3 of that statute defines employer and employee as follows: "3. 'Employer' \* \* \* means a \* \* \* corporation \* \* \* employing workmen in hazardous employments \* \* \*. 4. 'Employee' means a person who is engaged in a hazardous employment in the service of an employer." Employment in the operation of an electric street railway is specified in the act as a hazardous employment. (See § 2, Group, 1.)

While the relation of employer and employee as defined by the statute must have existed at the time deceased sustained the injury, it matters not

whether the employment was under a contract concededly valid as to both parties, or under a contract voidable at the election of the employer, or whether the liability of the employer for wages was fixed, or determinable under *quantum meruit*. The vital question is whether the relation of employer and employee existed between the deceased and the railway company, and the facts being conceded, the question is one of law. Liability under section 939 of the Penal Law is based upon the fact of the person being in fact an employee, and having obtained employment by aid of the false statement. The Workmen's Compensation Law does not except from its benefits employees who have obtained employment in violation of this provision of the Penal Law. The Workmen's Compensation Law is not to be read into the contract of employment as forming a part of it and as dependent for its enforcement upon the validity of the contract of employment. Although making the false statements constituted a misdemeanor, they did not render the contract of employment void, but at most voidable at the election of the employer, which it at no time saw fit to exercise.

The false representations in no way related or contributed to the cause of death. The plain purpose of the statute was to provide compensation to an employee for an accidental personal injury and to the family of an employee who has suffered death as the result of such injury sustained by the employee arising out of and in the course of such employment "without regard to fault as a cause of such injury," with the two specified exceptions of "where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty." (See § 10.) Concededly the injury was wholly accidental and neither exception applies.

In the case of *Hart v. N. Y. C. & H. R. R. Co.* (205 N. Y. 317), which was an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by negligence attributable to defendant, deceased had obtained employment with defendant by falsely representing in writing that he was over twenty-one years of age, thereby evading a rule of the defendant forbidding the employment of minors. While misrepresentation as to age was not punishable under section 939 of the Penal Law, nevertheless the deceased obtained the employment in which he was injured by means of such false representation.

The court held that while the misrepresentation of the deceased affected the contract of employment in the sense that it made it voidable, it did not affect the relation of master and servant with respect to the former's obligation under the statute respecting the safety of persons serving it. "Notwithstanding that the deceased, by his misrepresentation, evaded the rule of the defendant forbidding the employment of minors, he was, actually, in its service, and, therefore, was entitled to the protection of an employee accorded by the law."

In the case of *Galveston, H. & S. A. Ry. Co. v. Harris* (48 Tex. Civ. App. 434) it was held that the fact that a brakeman falsely stated in securing his position that he had never had any litigation with the railroad company, while ground for the rescission of his contract, did not render such contract absolutely void or terminate the relation of master and servant existing at the time of the injury.

The Union Railway Company was its own "insurance carrier," having furnished satisfactory proof to the Commission of its financial ability to pay the required compensation, and having deposited the securities required by the Commission to secure its liability to pay the same. However, it thereby obtained no immunity or exemption from liability for the payment of the compensation which would appertain to a stock corporation or mutual association had it instead of the railway company been the insurance carrier.

The action of the Commission in this case is consistent with the general scope of the Workmen's Compensation Law as recommended in the able and exhaustive report of the Wainwright Commission made to the Legislature of 1910, upon which the act was founded. The plain purpose of the statute was to make the risk of accident one of the industry itself, to follow from the fact of the injury, and hence that compensation on account thereof should be treated as an element in the cost of production, added to the cost of the article, and borne by the community in general. That the statute might be general in its scope, provision was made (§ 10) to provide compensation for every accidental personal injury to an employee arising out of and in the course of such employment with the two exceptions before specified.

The respondent contends, however, that in order properly to have brought the decision of the Commission before us for review the appellant should have filed exceptions to the findings of fact or conclusions of law. This was not necessary. The act provides (§ 68) that the Commission in conducting a hearing shall not be bound by common-law or statutory rules of evidence, or by technical or formal rules of procedure, except as in the act provided, but that the Commission may make such investigation, or inquiry, or conduct the hearing in such manner as to ascertain the substantial rights of the parties; that (§ 20) in making or denying an award, the Commission shall make and file a statement of its conclusions of fact and rulings of law; that the decision of the Commission shall be final as to all questions of fact, and except in case of appeal to this court, final as to all questions of law; and that (§ 23) such appeal shall be heard in a summary manner, and shall have precedence in this court over all other civil cases. There is no provision of the statute or rule of this court requiring the filing of exceptions, or, as in England and in some of the States, that the grounds of appeal be stated in the notice of appeal; but it was intended that the procedure both before the Commission and in this court should be simple and without unnecessary delay or useless formality; and that until otherwise provided, the appeal to this court should bring up the whole case, to be heard upon the record of the Commission and the briefs and arguments submitted by the respective parties.

The decision and award of the Commission should be affirmed. All concurred. Decision and award of Commission affirmed. *Kenny v. Union Railway Co.*, 186 App. Div. 497, March 3, 1915.

1. *The injured employee is also an officer or stockholder, or both, of his employer company.*— Even when he is an officer or a stockholder of his employer company, the injured employee may

have compensation. The Appellate Division has so held in *Beckmann v. Oelerich* (174 App. Div. 358) as follows:

As to the claim that the claimant was not an employee within the meaning of the act. The claimant spoke of his compensation for service as salary. He was the owner of 7 of the 100 shares of stock of the corporation. There is no claim that the payments received by him were dividends upon his stock. The Commission found that the weekly payment made him was his weekly wage. Its finding was fully justified by the evidence. While he was vice-president of the corporation his employment was doubtless through the board of directors, of whom he may or may not have been one. Although he was the general foreman, he worked in the various industries of the corporation the same as other workmen, and was doing the work of an ordinary employee at the time he was injured. His being vice-president and a stockholder in no way affected his status as an employee. (Connor Workmen's Compensation Law, 31, 96; *Aken v. Barnet & Aufesser Knitting Co.*, 118 App. Div. 463; *affd.*, 192 N. Y. 554.)

Two rulings of the Commission upon claims similar to the Beckmann claim are as follows:

By THE COMMISSION: The claimant is the president and a stockholder of the Rubin Musicant Company, a corporation engaged in business as stair builders. In addition to acting as president of the company, the claimant worked for the company as a mechanic, receiving the sum of two dollars and fifty cents per day as wages. While operating a machine in the construction of mouldings for stairs at the plant of the company, his hand came in contact with the knives of the machine, resulting in the amputation of one-half of the second and third fingers.

Held, that claimant, was an employee within the meaning of the Workmen's Compensation Law, notwithstanding the fact that he was also the president and a stockholder of the company.

Award of compensation is therefore granted for the period of twenty-seven and one-half weeks, fixed by subdivision 3 of section 15 of the Compensation Law, at the rate of nine dollars and sixty-one cents per week. *Cantor v. Rubin Musicant Co.*, S. D. R., vol. 3, p. 392, April 22, 1915.

LYON, Commissioner: The claimant is a consulting engineer and was formerly president of the Kennedy Manufacturing and Engineering Company. That company being about to retire from business, the claimant retired from the office of president, but continued his position as consulting engineer at a salary of \$1,000 per month. He is the owner of 185 out of 200 shares of the common stock of the company and 91 out of 96 shares of the preferred stock.

In the course of his duties as consulting engineer the claimant went to the Province of Ontario in the Dominion of Canada to inspect a plant which was being there erected, and while engaged in his duties, suffered an accident which has resulted in the very serious impairment of the use of one of his arms. The claimant has continued, since his accident, to draw the same salary as before, to wit, \$1,000 per month.



It is the claim of the insurance carrier that compensation cannot be granted here for three reasons: First, because the accident happened in a foreign country to which the Compensation Law cannot run; second, that the claimant being so large an owner of the capital stock of his employer is not an employee within the meaning of the statute; and third, that there is no basis for compensation because the claimant's salary or wages have not been reduced. The first objection of the insurance carrier, it seems to me, is completely covered by the recent decision of the Court of Appeals in *Matter of Post*, which seems to carry the Workmen's Compensation Law into every contract of hiring. The insurance carrier's second objection cannot be sustained, for although the claimant is the majority owner of the capital stock of his employer and seems to have been the controlling mind in the corporation, it must be remembered that a corporation is a separate entity and inasmuch as all insurance carriers, including the State fund, place the officers of corporations who have any duties to perform relative to the running of the plant in the category of employees, it would not seem that an officer of a corporation, even though he be the principal stockholder, is debarred from compensation for that reason alone.

In my opinion the third objection of the insurance carrier is well taken. Compensation under the statute is fixed upon the basis of loss of wages or salary and so long as it appears that Mr. Kennedy has lost no salary or wages, I can see no basis upon which compensation can be fixed. It is true that Mr. Kennedy stated that if it were not for the fact that he owned a great bulk of the stock and controlled the company, he would not be able to receive his former salary and that if he were to go into the employ of any other person his salary would necessarily be greatly reduced owing to his injury, but this I think cannot be made the basis of compensation so long as his salary in fact continued as it was before. It may be that in the future if Mr. Kennedy can show that his power of earning money has been reduced and a basis for compensation is fixed by the concrete case of reduction of salary, that he would be entitled to have his case again considered for the purpose of fixing the compensation on the basis of actual reductions in earning capacity. I advise that compensation be denied, but that proper bills for medical services should be approved. Such bills aggregating \$245 are presented, but are not itemized.

The Commission acted upon the foregoing matter in accordance with the foregoing opinion. *Kennedy v. Kennedy Mfg. & Engineering Co.*, S. D. R., vol. 7, p. 383, January 18, 1916.

Three months later the Commission reheard Mr. Kennedy's case and awarded him compensation on ground of reduced earning capacity. The ruling is as follows:

BY THE COMMISSION: The testimony is that Mr. Kennedy, before his injury was receiving \$1,000 per month salary, that the company for whom he formerly rendered services has gone out of business, that he is now employed by that company's successor at \$300 per month. It appears as though claimant's injury was permanent. In any event it seems clear that the claimant neither receives nor is able to earn as much as he both earned

and received prior to his accident. He is entitled to two-thirds of the difference between his former salary and his present earning capacity, but not to exceed \$15 per week, during the time of his partial disability.

On the 27th day of April, 1916, the Commission acted upon the foregoing matter in accordance with same. *Monthly Bulletin of State Department of Labor*, May, 1916, p. 8.\*

m. *Close cases under Workmen's Compensation Law, § 2.*—The Appellate Division and the Court of Appeals are careful not to usurp legislative functions. They adhere to the plain letter of the law and refuse to recognize far-fetched meanings. Their attitude in these respects is set forth in the cases of *Wilson v. Dorflinger & Sons*, *DeLaGardelle v. Hampton Co.*, and *Tomassi v. Christensen*, above, pp. 102–109. Yet they have found some occasion and necessity to define certain words and phrases of § 2. The word "operation" occurs in several of the groups. In *Edwardsen v. Jarvis Lighterage Co.*, the Appellate Division has defined the "operation of vessels" to include "loading or unloading." The opinion is as follows:

SMITH, P. J.: The claimant above named was a resident of this State and was employed as a captain of lighters by the Jarvis Lighterage Company, a New York corporation, whose principal place of business was in New York city. The second conclusion of fact as made by the Commission is that "while Edward Edwardson was on board the lighter 'Bradford' owned by Jarvis Lighterage Company, and while engaged in delivering bags of beans from the lighter to horse trucks at Jersey City, State of New Jersey, he was struck by a bag hook \* \* \*." The Commission ruled that the claim came within the provisions of the act and made the usual award, which is now appealed from on the ground that the act in general has no extraterritorial effect and that the employment of claimant was not that defined in group 8 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), which includes "The operation, within or without the State, including repair, of vessels other than vessels of other States or countries used in interstate or foreign commerce, when operated or repaired by the company." Group 10 includes "Longshore work, including the loading or unloading of cargoes or parts of cargoes," but does not contain any provision making it applicable to work outside of the State.

We think that the captain of a lighter may fairly be said to be engaged in its "operation" continuously from the beginning to the end of a round trip, including the loading and unloading of the craft, so long as he works upon it. We may, perhaps, assume that as a lighter makes but short trips a considerable part of the ordinary duties of its captain is to superintend or assist in its loading and unloading. If extra men were employed for

\* The Kennedy case was appealed to the Appellate Division and argued, January 9, 1917.

this work their duties might properly come under the term "longshore work" as described in group 10, but we think it would be unreasonable to hold that the captain of such a boat ceased to be employed in its "operation" the moment it began to load or unload.

If the claimant was engaged in operating the lighter when injured his right of recovery should not be defeated by his failure to show specifically that the vessel was not one of another State or country used in interstate or foreign commerce. As the employer and owner of the boat was a New York corporation, the presumption is that such was the case, and if appellants claimed a defense for the reason that such was not the case, we think it was incumbent upon them to have proved it upon the hearing before the Commission.

The award of the Commission should be confirmed, with costs. All concurred. Award affirmed. *Edwardsen v. Jarvis Lighterage Co.*, 168 App. Div. 368, May 7, 1915.

In *Mazzarisi v. Ward & Tully*, the Appellate Division was called upon to define "piles" and "pile-driving." Citing the Century Dictionary and a Minnesota case as authority, it held that driving sheeting for a jetty to protect baths on a water front was pile-driving. The opinion is as follows:

WOODWARD, J.: This court will not be warranted in disturbing the award made by the Commission. The evidence authorized the finding of the Commission that at the time Vito Mazzarisi received the injuries resulting in his death he "was working for his employer driving some piles on the beach at Coney Island and was assisting in driving sheeting." This sheeting was to be used in a jetty to extend into the ocean for the protection of the municipal baths on the water front at Coney Island. In work of this character sheeting is a form of piling. (*Volpe v. Cederstrand*, 126 Minn. 355; 148 N. W. Rep. 119.) The Century Dictionary defines "sheeting" as follows: "In hydraulic engineering, a lining of timber to a caisson or coffer dam formed of sheet piles or piles with planking between. Also, any form of sheet piling used to protect a river bank."

The "driving" of "sheeting" was, indubitably, under the evidence and the authorities, the driving of "sheet piling," and brought Mazzarisi's employment within group 11 of the enumerated employments in section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), to wit, "pile driving." The fact that the deceased may at the moment he met with injury have been engaged in performing a physical act more approximately incident to the making of this sheeting than to the driving of it down into the sand could not, had the same been found by the Commission or were the same required by the evidence, require reversal of the award.

The immediate cause of death was septicæmia, which actually, naturally and apparently unavoidably ensued from the injuries to the abdomen and bladder occasioned by the decedent's fall. (Workmen's Compensation Law, § 3, subd. 7.) The Commission's inquiry on this point was thorough and skillful; this court has no reason to challenge its conclusion. Doubtless

there was a diseased condition before the injury; it may be that the injury would not have caused his death but for these antecedent conditions; the injury may have been but one of concurring causes set in motion by the injury. None of these facts, if found or clear from the evidence, would warrant vacating the present award. The award should be affirmed. Award unanimously affirmed; COCHRANE, J., not sitting. *Massarisi v. Ward & Tully*, 170 App. Div. 868, January 5, 1916.

Also in the following cases, involving more or less of definition and interpretation, the injuries have been declared compensatable. The cases are noticed elsewhere in the bulletin (see List of Cases), the texts being given where court opinions have been handed down:

*Boilers, stationary engines and.*—Janitor chopping wood: *Praino v. Peloso*, 171 App. Div. 963; janitor removing ashes: *Kiernan v. Schermerhorn Estate*, S. D. R., vol. 8, p. 483.

*Buildings, construction of.*—Night watchman making rounds: *Sorge v. Aldebaran Co.*, S. D. R., vol. 3, p. 390; 171 App. Div. 959; 218 N. Y. Rep. 636.

*Clothing, manufacture of.*—Cloak model pricked by a pin; *Bloomfield v. November*, S. D. R., vol. 5, p. 385; 172 App. Div. 917; 219 N. Y. 374 (reversed by Court of Appeals because of failure to give notice of accident); tailor working by the piece at his own residence: *Fiocca v. Dillon*, S. D. R., vol. 7, p. 399; —App. Div.—, Nov. 15, 1916; tailor shop salesman mounted on a step ladder to look at a ticket on a piece of cloth: *Berliner v. Ritchie & Cornell*, S. D. R., vol. 4, p. 446; 172 App. Div. 913.

*Driving*, see *Vehicles, operation of*.

*Drugs and chemicals, manufacture of.*—General utility man putting up a shelf in a wholesale drug establishment: *Larsen v. Paine Drug Co.*, 169 App. Div. 838; 218 N. Y. 252.

*Engines*, see *Boilers, stationary engines and*.

*Longshore work.*—Watchmen: *Oberg v. McRoberts & Co.*, S. D. R., vol. 6, p. 386; 175 App. Div. 1, November 15, 1916 (This Commission award was reversed by the Appellate Division and the claim dismissed); *Rodgers v. Oceanic Steam Navigation Co.*, S. D. R., vol. 7, p. 393.

*Machinery, manufacture of.*—Salesman inspecting machinery installed in customer's plant: *Benton v. Fraser*, S. D. R., vol. 5, p. 392; 172 App. Div. 913; 219 N. Y. 210.

*Mining.*—Private policeman, who was also deputy sheriff, stabbed by arrested party: *James v. Witherbee-Sherman & Co.*, S. D. R., vol. 2, p. 483.

*Packing houses.*—Cutter and meat lugger unloading beef from car: *Meyer v. Morris & Co.*, S. D. R., vol. 6, p. 334; 173 App. Div. 990; 219 N. Y. —, December 12, 1916.

*Pianos, manufacture of.*—Porter moving piano: *Mooney v. Weber Piano Co.*, S. D. R., vol. 5, p. 396; 172 App. Div. 917.

*Printing.*—Employee slipping on floor: *Winters v. N. Y. Herald Co.*, 171 App. Div. 960.

*Railways, operation, including construction and repair.*—Employee engaged in interstate commerce, where the railroad was not chargeable with negligence (For cases, see under heading, "The injured employee is working for a railroad engaged in interstate commerce", above, pp. 162-181); lineman seeking shelter from storm: *Moore v. Lehigh Valley R. R. Co.*, S. D. R., vol. 2, p. 472; 169 App. Div. 177; 217 N. Y. 627; section hand poisoned by ivy: *Plass v. Central N. E. R. Co.*, S. D. R., vol. 4, p. 331; 169 App. Div. 826; laborer crossing tracks in response to call of foreman to come to dinner: *Carini v. Nickel Plate R. R.*, S. D. R., vol. 4, p. 423; street car motorman driven insane by shock of collision: *McMahon v. Interborough R. T. Co.*, S. D. R., vol. 5, pp. 371, 374; track laborer attempting to catch ride while walking from bunk car to place of work: *Avanzato v. Erie R. R. Co.*, S. D. R., vol. 4, p. 397;—App. Div.—; S. D. R., vol. 8, p. 414; laborer being carried from one point of work to another on top of car: *Caccavano v. N. Y., Ontario & Western R. R. Co.*, S. D. R., vol. 6, p. 380; 174 App. Div. 900; pay car collector crossing railroad tracks; *Hill v. N. Y. Consolidated R. R. Co.*, 174 App. Div. 900.

*Soda waters, manufacture of.*—Dispenser washing glasses: *Paulson v. Schlumbolm*, S. D. R. vol. 5, p. 376.

*Stone cutting or dressing.*—Laborer putting stones into stone crusher: *Dolici v. Myers Contracting Co.*, S. D. R., vol. 4, p. 376, May 4, 1915; 172 App. Div. 914.

*Storage.*—Shipping clerk and helper changing show room into storage room: *Burton v. Whelen & Sons*, S. D. R., vol. 5, p. 395; 172 App. Div. 913.

*Subway work.*—Employee on the way from the subway to the surface: *Kiernan v. Friestedt Underpinning Co.*, S. D. R., vol. 5, p. 390; 171 App. Div. 539; *Di Paolo v. Crimmins Contracting Co.*, S. D. R., vol. 5, p. 428; 173 App. Div. 988; 219 N. Y. Rep.—; employee on the way to attend a call of nature: *Cino v. Morton & Gorman Contracting Co.*, S. D. R., vol. 5, p. 387; 172 App. Div. 917.

*Tanneries.*—Abrasion of workman's skin with resultant anthrax infection: *Henry v. Levor & Co.*, S. D. R., vol. 6, p. 388.

*Vehicles, operation of.*—Employee engaged in incidental occupation or work (For cases, see under headings, "The occupation is incidental" and "The work is incidental", above, pp. 182–195); porter operating hand truck; *Farrar v. Gristede Bros.*, files of commission, claim no. 24089; automobile racer: *Dearborn v. Peugeot Auto Import Co.*, 170 App. Div. 93; S. D. R., vol. 7, p. 413; — App. Div. —, November 15, 1916; driver shoveling sand into wagon: *Dale v. Saunders Bros.*, S. D. R., vol. 5, p. 372; 171 App. Div. 528; 218 N. Y. 59.

*Vessels, operation of.*—Employees drowned: *Lazarick v. N. Y. New Haven & Hartford R. R. Co.*, 171 App. Div. 959; *Tirre v. Bush Terminal Co.*, S. D. R., vol. 5, p. 427; 172 App. Div. 386; S. D. R., no 53, p. 31; *Countryman v. Newman*, S. D. R., vol. 7, p. 421; 174 App. Div. 900.

## TREATMENT AND CARE OF INJURED EMPLOYEES

(Workmen's Compensation Law, §§ 13, 24, 33)

The employer must promptly furnish physician, nurse, hospital service, medicines, crutches, etc., to his injured employee during sixty days. If the employee requests them and the employer does not comply, the employee may procure them himself at his employer's expense. But if the employer does comply, the employee, according to the following decision, must accept them in lieu of physician, treatment, care, etc., of his own choosing:

COCHRANE, J.: One Frank Pisarsky was an employee of the defendant and while in its service on January 19, 1915, sustained an injury for which he was entitled to compensation under the Workmen's Compensation Law. The defendant provided a concededly competent physician and surgeon to care for Pisarsky until January 23, 1915, when the latter arbitrarily refused to accept such services and requested the defendant to provide for him the services of the plaintiff, who is a physician and surgeon, which the defendant declined to do. The plaintiff thereafter rendered medical services to Pisarsky and presented a bill therefor to the defendant amounting to fifty-four dollars, which the defendant refused to pay. The State Industrial Commission thereafter, without notice to the defendant, approved said bill at forty dollars, and the question for our consideration is whether the defendant is liable therefor to the plaintiff.

The Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) in section 13 thereof provides as follows: "The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or be requested by the employee, during sixty days after the injury. If the employer fail to provide the same, the injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so. All fees and other charges for such treatment and services shall be subject to regulation by the Commission as provided in section twenty-four of this chapter, and shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living." By section 24 of the act it is also provided: "Claims for legal services in connection with any claim arising under this chapter, and claims for services or treatment rendered or supplies furnished pursuant to section thirteen of this chapter, shall not be enforceable unless approved by the Commission. If so approved, such claim or claims shall become a lien upon the compensation awarded, but shall be paid therefrom only in the manner fixed by the Commission."

Stated concretely the practical question is whether the employer or an injured employee may designate the particular individual or individuals who are to furnish the "medical, surgical or other attendance or treatment, nurse and hospital service" which the statute contemplates shall be provided by the employer. The question is one of statutory construction, and such construction must be given as most accords with the phraseology employed in the statute and as may be most reasonable and conducive to public policy and the objects sought to be accomplished by the statute.

Similar provisions are contained in the Workmen's Compensation Laws of many of the States of the United States, but in none of them has any decision been brought to our attention where it has been held that the employee could select the individual to render the services which the employer was required to provide. The phraseology of the statutes in the various States differs and consequently no precedent exists for the interpretation which should be placed on the statute of this State, but the fact that it has nowhere been held that the employee can exercise this privilege is somewhat indicative of the general policy of the law on the subject. In *City of Milwaukee v. Miller* (154 Wis. 852, 665) the Supreme Court of that State said: "The burden for all reasonable medical aid and surgical treatment, medicine, etc., is cast on the employer, limited as to time, with the very wise and necessary safeguard against imposition that the choice of the medical or surgical attendant shall be left with him and that, if the injured person unnecessarily chooses his own physician, he will do so at the peril of having to bear the burden of the expense. That is a very valuable protection to injured persons as well as to employers. The natural effect of a firm enforcement of it will be to expedite the return of honest claimants to the walks of industry and prevent them from having their misfortunes exploited for others' benefit. If the advantages to be gained by a firm administration of such provision would be greater on one side than on the other, it is the side of the employees. Therefore, in case of a personal injury to an employee in the line of his duty, the law should be construed and applied so as to secure to his employer reasonable opportunity to conserve the mutual interests of the two parties to the misfortune by supplying the medical and surgical needs of the injured." The court in that case by using the language quoted was simply expressing the same idea which had existed in the minds of the legislative committee which drafted the law of that State and, as stated in that case, reported it to the Legislature as follows: "The employer must provide medical and surgical treatment, medicine, etc., for ninety days. This provision is made for two reasons: *First.* As a rule an employer is more competent to judge the efficiency of the doctor employed and to provide efficient medical and surgical treatment. *Second.* It is to the interest of the employer to furnish the very best medical and surgical treatment, so as to minimize the result of the injury and to secure as early a recovery as possible. The more serious the result of the injury, the more the employer must pay. Also by this means he obtains a complete knowledge of the exact condition of the injured employee."

It is urged in the present case, however, that the use of the word "requested" in section 13 of the act above quoted indicates that the employee may exercise his choice as to the person who shall render him service. I am unable to appreciate the force of this argument. Whatever distinction may



exist between the words "required" and "requested" as used in the statute and whatever additional force or meaning is given to the statute by the use of the word "requested" it seems to me quite clear that both words relate to the nature or character of the attendance or treatment or services and not to the personnel of the one who is to render such attendance or treatment or services. The word "required" sometimes means, according to Webster, "needed," or, according to the Century Dictionary, "rendered necessary or indispensable." In many cases the nature of the injury is such that the need for particular medical or surgical or other treatment is apparent and may be imperative, but the injured employee by reason of his injury may not be physically conscious of that fact or in any condition to make a request therefor. In such cases the statute requires the employer to make proper provision for such treatment without waiting for a request of the employee. In other cases the necessity or propriety of medical, surgical or hospital service may not be apparent or obvious but it may nevertheless be necessary and proper and in such case the employee must make the request in order to bring the reasonableness or the propriety of such attendance or service home to the employer. But the duty to provide certain services which is cast by the statute upon the employer naturally implies the right of the latter to select his own agencies for the proper fulfillment of that duty, unless language is found in the statute indicating a contrary intent. I think that had the Legislature intended such a radical departure from the logic of the situation as would be created by casting upon the employer the duty of providing important professional services without permitting him the slightest voice or discretion in the selection of the person or persons who should render such services and had intended to create such an important innovation in the law, such intention would have been manifested by clear, apt and unmistakable language.

Furthermore, I am unable to see why any request should be made of the employer if the latter has no choice in the selection. The law does not require the performance of useless acts. If an injured employee may select a particular physician at the expense of the employer why should he request the employer to provide him? Why that circuitry of action if the employer can do nothing but execute the wish of the employee? It would be more direct for the employee himself to call the physician instead of asking the employer to do so. The purpose is not to enable the employer to make a contract with the physician and thus protect himself against exorbitant charges, because the statute places the matter of all fees and charges for such services under the regulation of the Commission, and provides that such expenses "shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living." Neither is the request to an employer for a particular physician essential in order that the employer may investigate the propriety of such services, because section 18 of the act requires notice of the injury to be given the employer within ten days. I am unable to see that the 2d and 3d sentences of section 13 of the act have any practical meaning whatever if the contention of the plaintiff herein is tenable. Eliminate them completely from the section and the same result is reached in all particulars if the construction contended for by the plaintiff is to prevail. Such a construction should be given to the statute if possible as will

give to every part thereof some use and efficacy. I think the proper construction of this statute is that if services or supplies of the character indicated by section 13 are needed or reasonably and properly requested by the employee, the employer must provide the same, using his own judgment and exercising his own choice as to the person who shall render such services and as to the nature of the supplies, and "if the employer fail to provide the same, the injured employee may do so at the expense of the employer." And in such case the charges are subject to regulation by the Commission and may be recovered of the employer. It is only by this latter construction that every part of section 13 can be rendered effective. Such construction likewise as heretofore indicated is more in harmony with the policy of the law as declared in other jurisdictions.

The employer of course cannot make an unreasonable selection. There may be instances where the employee would have a right to be consulted and a reasonable and proper deference paid to his wishes. In Massachusetts the statute (Acts of 1911, chap. 751, pt. II, § 5)\* provides that "the association shall furnish reasonable medical and hospital services, and medicines when they are needed," and it has been held by the Industrial Accident Board of that State that "in ordinary cases the insurance company has the right to elect what doctor and at what hospital the injured employee shall be treated. It may happen, as it has in many cases, that because of sufficient reasons growing out of the nature of the injury, personal dislike of the doctor or upon other grounds, the Industrial Accident Board will approve a reasonable bill where services were rendered by a physician selected either by the employee or employer." (See 1 Bradbury's Workmen's Compensation Law [2d ed.], 552, notes, ¶ 2.) But that question does not here arise, because it is stipulated that the physician offered by the defendant was competent, and no reason is suggested why his services should not have been accepted by the plaintiff.

Judgment is ordered for the defendant, without costs.

All concurred, KELLOGG, P. J., in result in opinion, in which LYON, J., concurred.

KELLOGG, P. J. (concurring in result):

The provisions of section 13 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) are not intended for the benefit of the employer but of the injured employee. The fact that the payments to be made by the employer may depend upon the duration of the disability has nothing to do with the choice of the doctor or nurse or hospital, because after sixty days the injured employee must obtain and pay for his own doctor, nurse or hospital. The provision, therefore, is an emergency one to tide over the first sixty days, it being considered that the claimant will then have his award and will be able to employ a doctor for himself. His wages are stopped, and the circumstances require immediate help. I think the section means, so far as we are interested in it, that the employer must furnish a doctor such as the circumstances reasonably require and as the injured employee may reasonably request. A sick man must select his own doctor, nurse or hospital; otherwise the benefits intended will not be realized. There is no reason why the company should dictate as to the personnel of the doctor, the

\* Since and by Acts of 1914, chap. 708, § 1.—[Rep.]

nurse or of a hospital for the first sixty days and have no voice in those matters after that time. It may cost the company less to select its own doctor, but the interest of the patient and not the economy of the employer was in the mind of the Legislature. I think, therefore, that if the injured employee makes a reasonable and timely request for the employment of a particular doctor, reasonably available, the request should be observed; but in this case the company's doctor attended the patient for three or four days without objection; the patient apparently acquiesced in the selection; there is no suggestion that the services were not properly rendered, the case properly treated, or that the patient was not making reasonable progress. The injury was a burn upon the foot. Evidently the employee was as well able to select a doctor on that day as any other. By continuing to receive the treatment of the company's doctor for three or four days he assented to his employment and cannot now repudiate it. It is not alleged that the plaintiff was the personal or family physician of the employee; no reason is alleged why he should supersede the doctor in charge; it does not appear why he insisted upon attending the case at the expense of the defendant when it already had a competent doctor in charge. The patient has so far requested and approved of the selection of the physician furnished by the company that the request to employ the plaintiff is not reasonable or binding upon the defendant. I, therefore, concur in the result.

LYON, J., concurred. Judgment ordered for the defendant, without costs. *Keigher v. General Electric Co.*, 173 App. Div. 207, May 3, 1916

In *Morey v. Worden*, S. D. R., vol. 2, p. 494, the injured employee did not request treatment within the sixty day limit but the employer had had notice twice that treatment was necessary. Therefore, the Commission awarded the amount expended for treatment.

The claim of the injured employee's physician upon the compensation award is indirect. He has a lien payable under rules made by the Commission. Workmen's Compensation Law, § 33, prohibits assignment of the compensation claim. A physician can not maintain an action against an employer under an assignment to him by the injured employee, or by beneficiaries, of the part of the compensation granted for his services. The Supreme Court, reversing a judgment of the Municipal Court of Manhattan, has so held in the case of *Bloom v. Jaffe* following:

LEHMAN, J.: The plaintiff is a physician who apparently furnished medical services to an injured workman. It was conceded at the trial that the workmen's compensation commission fixed the physician's compensation at twenty-one dollars. Apparently the parties meant by this concession that the commission approved a claim for services of this amount and included it in the award to the workman, as provided by section 24 of the Workmen's Compensation Law. It is not expressly conceded, but it is quite apparent, that the

defendant was the employer of the injured workman. The employee has assigned the award, or this portion of the award, to the plaintiff. Upon these facts the plaintiff has been awarded judgment for the sum of twenty-one dollars.

It seems to me quite plain that the physician has no cause of action. At common law a physician who rendered services to an injured employee had no right of action against the employer, although the injured employee might in a proper case have recovered the reasonable value of such services as part of his own damages. The Workmen's Compensation Act has given an injured employee a new kind of remedy and seeks to compensate him for all injuries suffered in the course of his employment, regardless of whether these injuries were caused by the negligence of his employer. As part of this compensation it provides in section 13 for medical service at the expense of the employer, and where the employee has been compelled to procure such service himself the law makes provision for the inclusion of a claim for such service in a proper case in the award made to the employee.

The primary purpose of the statute is not, however, to provide compensation to the physician, but solely to provide compensation to the injured employee for such medical service as the law permits him to procure at the expense of the employer. It does not, therefore, provide for any award to the physician, but merely gives the physician a lien upon the compensation awarded to the workman which "shall be paid therefrom only in the manner fixed by the commission." § 24. In this case the plaintiff is not seeking to enforce his lien on the compensation awarded to the employee, but is seeking to recover the amount directly from the employer. Moreover, even if he were seeking to enforce his lien on the award in a direct proceeding before the commission, he would be bound to show that the commission had fixed the manner of its payment. The assignment from the injured employee can, of course, give him no right of action, because the statute expressly declares that claims for exemptions or benefits due shall not be assigned. § 33.

In basing this decision upon the ground that no award has been made to the plaintiff which he can enforce against the defendant, I certainly do not desire to imply that in any event payment of an award could be enforced against the employer except by action instituted by the commission as provided in section 26. Inasmuch as the plaintiff has, under no circumstances, any direct claim for compensation against the employer, we cannot upon this appeal consider in what manner the payment of compensation to an employee may be enforced.

Judgment reversed, with ten dollars costs, and complaint dismissed, with costs.

WEEKS and DELEHANTY, JJ., concur. Judgment reversed, with costs. *Bloom v. Jaffe*, 94 Misc. 222, March 13, 1916.\*

The wife or other relative of a claimant for compensation, not being a professional or graduate nurse, should not receive payment for services in caring for him: *Dunham v. Phelan & Sullivan*, Monthly Bulletin of Department of Labor, June, 1916, p. 30.

\* For a similar case, compare *Hirsch v. Zurich General A. & L. Ins. Co.*, 97 Misc. 380.

## SCHEDULE OF DISABILITY COMPENSATION.

(Workmen's Compensation Law, §§ 15, 25)

Section 15 of the Workmen's Compensation Law enumerates and defines specific forms of disability arising out of accident. These forms range from total permanent disability to the disability of loss of one-half of a finger or toe. Subject to minimum and maximum limits, it fixes special compensation for each form. For certain injuries the compensation payments extend for life, for others an indefinite period, and for others a fixed number of weeks. It recognizes and provides compensation for "all other cases" of permanent total or partial disability than those that it particularizes. It prescribes the effect of a previous disability relative to compensation for a later injury. In a number of decisions the courts have interpreted its various provisions and their relations one to another.

*A. Previous disability.*—An early case adjudicated by the Commission, certified to the Appellate Division and appealed to the Court of Appeals, related to the loss of a hand, a foot, an arm, a leg or an eye by an employee who had previously lost one of these members. The question was: Should the employee receive the compensation fixed for total permanent disability under subdivision 1 or the compensation fixed for loss of a single member under subdivision 3? In the particular case the employee, who had lost his left hand in 1892, lost his right hand in 1914. The State Industrial Commission made an award to him for permanent total disability. The courts affirmed the Commission's award. The decision of the Appellate Division was handed down, May 5, 1915. Meanwhile the State Legislature, not liking the effect of the interpretation, added to subd. 6 of § 15 a proviso "that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability." The court's interpretation might have made it difficult for crippled persons to obtain and retain employment. The Governor's approval made

the bill a law, May 12, 1915 (L. 1915, ch. 615). The text of the Appellate Division's decision in the case, as affirmed by the Court of Appeals without opinion, is as follows:

SMITH, P. J.: The claimant was injured on July 6, 1914, by having his right hand severed at the wrist. His left hand was amputated in the year 1892. The question certified is whether the claimant is entitled to compensation for permanent total disability under subdivision 1 of section 15 of the Workmen's Compensation Law, or for compensation as for the loss of one hand under subdivision 3 of said section.

If a man has two hands he is presumably a more efficient worker and can receive higher wages than if crippled by the loss of one hand. The method of payment of compensation for the loss of one hand is to allow sixty-six and two-thirds per centum of the salary which the injured party was earning for 244 weeks. If the injured party had two hands and were earning \$20 a week, if he lost one hand he would recover \$3,253.33. Another workman having lost one hand before entering the employment would be receiving say \$10 a week for less efficient service. If that workman lost the second hand in the service, if the claim of the insurance carrier is right, he would recover for 244 weeks at \$10 a week, or \$1,626.67. So that for the loss of the second hand, which had its double value on account of the previous loss of the first hand, under this system he would be entitled to recover only half as much as for the loss of the first hand. This anomalous result would indicate that the Legislature could not so have intended. By subdivision 1 of section 15 the loss of both hands shall presumably constitute permanent total disability. As compensation for that permanent total disability he is to receive sixty-six and two-thirds per cent of the average weekly wages that he is then earning. As the man with one hand is presumably earning less wages than a man with two hands, to allow for the loss of the second hand as a permanent total disability, a percentage of the weekly wage that he was then earning would be in complete harmony with compensation to one who had lost both hands by the accident, who receives his sixty-six and two-thirds per cent upon the greater wages that he was earning at the time of the accident.

Moreover, this reasoning accords with the rule which seems to be laid down in subdivision 6 of section 15, which provides that the fact that an employee has suffered previous disability shall not preclude him from compensation for a later injury, "but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury. Cases are cited upon the Attorney-General's brief which indirectly lend support to his contention that the claimant has the right to recover as for a permanent total disability. But the decision may well rest upon the logic of the situation, in view of the fact that the amount of compensation depends upon the weekly wage, and the weekly wage is affected by his crippled condition at the time of the accident.

In answer to the question certified, we decide that claimant is entitled to recover as for permanent total disability.

All concurred (KELLOOG, J., in result in memorandum), except WOODWARD, J., dissenting.

KELLOGG, J. (concurring in result) :

The claimant had his left hand amputated in 1892. On July 6, 1914, he lost his right hand, for which he asks compensation. The only question is whether his case comes within subdivision 1 of section 15 of the Workmen's Compensation Law, which provides for total permanent disability, or subdivision 3 of that section, which provides for permanent partial disability.

Subdivision 1 provides the compensation for total permanent disability, and then provides: "Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts."

Subdivision 3, entitled "Permanent partial disability," provides compensation "in case of disability partial in character but permanent in quality." Among the disabilities there enumerated is found the loss of a hand. Subdivision 6 of the section is entitled "Previous disability," and provides that the fact that an employee has suffered previous disability shall not preclude him from compensation for a later injury, nor preclude compensation for death resulting therefrom, but that in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury.

We have seen that subdivision 1, after enumerating certain disabilities, continues: "In all other cases permanent total disability shall be determined in accordance with the facts;" therefore, there may be total permanent disabilities other than those specifically mentioned. The Commission has found that the loss of claimant's hand was a permanent total disability, and such would naturally be the result. Subdivision 3 does not provide for the loss of a hand where it results in total disability, but only applies to such loss where the resulting disability is partial in character but permanent in quality.

The claimant by the accident has lost all the ability he had of earning a living. The disability, is, therefore, total. His wages were evidently based upon the fact that he was previously partially disabled, and, therefore, the compensation to be awarded to him will be based upon such wages.

Within the clear reading and spirit of the statute it is purely a question of fact whether by the accident the claimant was rendered totally permanently disabled and the Commission has found the facts in his favor. He is, therefore, entitled to compensation for a total permanent disability.

Question certified answered in the affirmative. *Schwab v. Emporium Forestry Co.*, 167 App. Div. 614, May 5, 1915.

**B. Change of awards.**—It is the practice of the State Industrial Commission, sanctioned by the Workmen's Compensation Law, § 22, to review and modify its awards from time to time on account of developments relative to the injuries of claimants, minority wage expectation, and other conditions. Thus, the Commission awarded a plasterer, whose eye was hurt by a fragment of stone, an indefinitely continuing payment of fifteen dollars per week for temporary total disability. When, after nineteen weeks

of such payment, the sight of the eye proved to be entirely gone, the Commission changed the award to twenty dollars per week for one hundred and twenty-eight weeks for the permanent partial disability of loss of the eye. In making the change, the Commission deducted the nineteen weeks' payment from the one hundred and twenty-eight weeks' award. The Commission said:

"It has been contended that to limit the compensation in this case to a period of 128 weeks would be unfair to claimant, because in addition to losing the eye, he had been totally disabled from working for a period of 21 weeks before the sight of the eye was entirely destroyed.

The law, however, provides that the compensation for the loss of an eye shall be in lieu of all other compensation except the benefits provided by section 13. The period of disability before the extent of the injury has been determined is not taken into consideration. In some cases the loss of the eye results immediately, while in other cases, such as the case under discussion, a long period of time may elapse.

It was the intention of the Legislature to exclude all other provisions for compensation for this character of injuries and to fix reasonable rules for determining the extent of the compensation. The Legislature has, therefore, excluded these injuries from the contemplation of the provision contained in subdivision 2 of section 15, under which the award for temporary total disability has already been made.

We hold, therefore, that claimant is entitled to compensation for a period of 128 weeks at the rate of \$20 per week and that there shall be deducted from the amount due, the sum of \$285, already paid under the previous awards." *Kreppel v. Boyland*, S. D. R., vol. 2, p. 489, Jan. 9, 1915.

In another instance, the Commission awarded an eighteen year old youth, whose hands had been caught between cylinder stacks of a paper machine, two hundred and forty-four weeks for loss of his left hand and one hundred and sixteen weeks for loss of four fingers of his right hand. A week later it decided that the injury to the right hand amounted to loss of use and changed the award to \$9.61 weekly during his life for total permanent disability. In fixing this weekly payment the Commission allowed for his minor's expectation of wage increase (Workmen's Compensation Law, § 14, subd. 5), *Carkey v. Island Paper Co.*, S. D. R., vol. 6, p. 321, November 3, 1915.\* A similar case of loss of fingers involving change of award was *Rockwell v. Lewis*, 168 App. Div. 674; 218 N. Y. 692, noticed below, p. 281.

C. *Concurring awards not within intent of law.*—The Appellate Division, in the case of a short-circuited motorman, losing

\* This case was argued in the Appellate Division, January 3, 1917. entirely unrelated subject of wages and is given in such connection on pp. 331, 332.



his right foot by amputation and temporarily losing use of his hands and his other foot by burns, affirmed the first of two awards of the State Industrial Commission and reversed the other. The first award, made January 12, 1915, was for the permanent partial disability due to the amputation of the foot; the second, two weeks later, January 26, 1915, for the temporary total disability due to the other injuries. The court declared that concurring awards must "to a considerable extent render nugatory the beneficent purpose of the statute." Counsel for the Commission, referring to the double compensation, has said:

"I attempted to justify this by stating that the Commission intended to make an award for the leg with payments to start when the other disability ended, and that the awards were intended to run consecutively and not concurrently. The court held that the award for the other injuries should not have been made, the effect of the decision being that compensation could not be paid for the other injuries, unless the disability exceeded the statutory period fixed for the loss of the leg. (Since modified)." *Bulletin of State Industrial Commission*, November 1915, vol. 1, p. 15.

The part \* of the Appellate Division's opinion pertaining to the concurring awards follows:

LYON, J.: This is an appeal from awards made by the Workmen's Compensation Commission. The facts are undisputed. The claimant at the time of receiving the injuries, November 7, 1914, was a motorman on a trolley express car of the defendant, and had been in its employ for seven years. He was injured while standing on top of the car, removing the trolley pole from its socket. One end of the trolley pole came in contact with the trolley wire while his right foot was against the socket, severely burning both hands and both feet, and less seriously injuring other portions of his body. These injuries necessitated the amputation of his right foot, and at least temporarily totally incapacitated him from using his left foot or either hand. \* \* \* Upon a hearing had before a Commissioner and a Deputy Commissioner, January 12, 1915, an award was made claimant for the loss of his foot; and upon a hearing had before Deputy Commissioners, January 26, 1915, an award was made for injuries other than the loss of a foot.

The Commission by decision of date January 28, 1915, approved and confirmed said two awards and formally awarded the claimant compensation for the loss of his right foot. \* \* \* As to the award of thirteen dollars and forty-six cents for injuries other than the loss of the right foot, consisting mainly of injuries to the hands, the claimant was given by the two awards, which ran concurrently, twenty-six dollars and ninety-two cents per week, or six dollars and seventy-three cents more than his average weekly earnings,

\* The omitted part of the opinion, as indicated by the stars, has to do with the entirely unrelated subject of wages and is given in such connection on pp. 331, 332.

the second award being, as stated in the brief of the Commission, for temporary total disability because of injuries sustained by the claimant other than those resulting in the loss of his foot.

Making the second award was, we think, plainly contrary to the intent of the Workmen's Compensation Law. The purpose of that statute as expressed in the report of the legislative commission upon which it was mainly founded, was not to furnish full compensation "but a sum payable weekly, in general half wages, which we believe will keep him and those dependent on him out of absolute destitution." (See First Report, 1910, p. 50.) While the Legislature has provided for more liberal treatment of the injured employee than that suggested in this report of the Wainwright Commission, there is nothing to be found in the act justifying the allowance of concurring compensation for temporary total disability when the employee is already receiving a weekly compensation of two-thirds of his average weekly wages, or full compensation for total disability. The act provides but the single rate of compensation, to wit, sixty-six and two-thirds per centum of the employee's average weekly wages; and this percentage for a longer or shorter period is applicable to all disabilities whether total or partial, and is the maximum compensation provided for by the statute. (See § 15.) The act was not intended as a source of profit to the employee or as a means of punishment of the employer, who in many cases is wholly free from any fault in connection with the accident. If concurring awards may be allowed it is easy to see how that practice may be carried to such an extent as to become very burdensome and unjust to the employer and very unfortunate to an improvident employee, and to a considerable extent render nugatory the beneficent purpose of the statute.

In this case, had the claimant in addition to losing his foot have lost a thumb and a second finger, for which he would have been entitled to the awarded compensation for 60 weeks and 30 weeks respectively, the awards therefor, if running concurrently, would have entitled him to twice his weekly wages for 30 weeks, to once and a third times his weekly wages for 30 weeks, and to two-thirds of his weekly wages for 145 weeks, when the payment of compensation would terminate. With the awards taking effect consecutively, such employee so injured would receive sixty-six and two-thirds per centum of his weekly wages for a period of 295 weeks. The necessity of the awards taking effect consecutively rather than concurrently in order to carry out the plain purpose of the statute is apparent. We are referred to decisions of other States holding that awards may be made to run concurrently, but in each of such States the statute allowed it.

We are not to be understood as holding that if at the expiration of the 205 weeks, disability of claimant shall exist by reason of the injuries resulting from this accident, other than the disability arising from the loss of the foot, the claimant will not be entitled to a further award on account thereof, but as simply holding that the claimant by the first award having been allowed compensation to the full amount allowed for total disability, could not by the second award be awarded further compensation for total disability on account of other injuries arising out of the same accident, which second award should run concurrently with the first award.

While the Commission has found that the injuries other than those resulting in the loss of the foot have disabled the claimant from working until

January twenty-eighth, the date of the report, and has awarded compensation therefor to February 27, 1915, and has continued the case for further hearing, there is no finding that such disability is permanent, as would be the case in the event of the loss of a thumb or finger, or that the disability will exist at the expiration of the period of 205 weeks.

The award of compensation for the loss of the foot should be affirmed. The award of compensation for injuries other than the loss of the foot should be reversed, but without prejudice to the further continuance of the case and to the right of the claimant to make further application to the Commission, or its successor, for an award of compensation on account of such other injuries, should he be so advised. *Fredenburg v. Empire U. Railways, Inc.*, 168 App. Div. 618, July 1, 1915.

Two months after the handing down of the above opinion the Appellate Division amended its concluding paragraph to read as follows:

Award of compensation for loss of foot affirmed. Award of compensation for injuries other than the loss of the foot reversed, but without prejudice to the further continuance of the case and to the right of the claimant to make further application to the Commission or to its successor for an award of compensation on account of such other injuries should he be so advised. (270 App. Div. 942, September, 1915.)

If an employee suffers temporary injury of certain members and permanent injury or loss of other members, as did Fredenburg, the Commission's true order of compensation, by consecutive awards in compliance with the court's opinion, is to make the award for temporary disability first and the award for permanent disability later. Otherwise the temporary wounds may have long since healed at the time when payment of award by the week for the permanent injury runs out. Time is often required, too, to determine whether an injury is going to be permanent or not. The Commission accordingly adopted this order in *Strobl v. Langsdorf & Co.*, Files, Claim No. 7291. Strobl cut the first and second fingers of his right hand upon a circular saw. The second finger quickly healed without deformity but the index finger stiffened permanently. On September 27, 1915, the Commission awarded Strobl \$17.08 for one and two-thirds weeks' disability from August 20 to August 31, 1915, on account of his second finger; and on October 19, 1915, awarded him \$10.25 weekly for forty-six weeks, beginning August 31, 1915, on account of permanent loss of use of his index finger. In

connection with the Strobl case the Commission, under date of September 22, 1915, adopted the following general resolution:

WHEREAS, in the matter of the claim of Guy Fredenburg vs. Empire United Railways Company, the Commission made an award of 205 weeks for the loss of a foot, and an award of 14 weeks concurrently therewith for disability due to other injuries, and an appeal was taken to the Appellate Division of the Supreme Court, Third Department, and a decision handed down by the Appellate Division on September 15, 1915, as follows:

"Award of compensation for loss of foot affirmed. Award of compensation for injuries other than the loss of the foot reversed, but without prejudice to the further continuance of the case and to the right of the claimant to make further application to the Commission, or to its successor, for an award of compensation on account of such other injuries should he be so advised."

RESOLVED, that awards in cases of this character in the future, be made consecutively instead of concurrently, and where the disability due to the other injuries is less than the period fixed for amputation, the claim be treated as a disability case until the disability is ended, payments at that time to commence for the amputation, or loss of member.

In *Marhoffer v. Marhoffer*, S. D. R., vol. 8, p. 438, the Commission made two awards in one ruling, stipulating that payment of the second award should be made subsequent to payment of the first. The Appellate Division, in an opinion, unanimously affirmed this award, November 15, 1916, and at the same time, on the authority of its Marhoffer decision, affirmed a number of similar awards without opinion: 175 App. Div. 52.

D. *Loss of use followed after a time by amputation.*—An employee lost the use of his second finger by the blow of a sledge hammer and was laid up in consequence for three months. Then the finger was amputated. The employee asked for compensation for temporary total disability for the three months (Workmen's Compensation Law, § 15, subd. 2) and, in addition, for the fixed allowance of thirty weeks for loss of a second finger (Workmen's Compensation Law, § 15, subd. 3), a total of about forty-two weeks' compensation. The Commission held that the employee was entitled to compensation for thirty weeks only. "The loss of the finger by amputation," it said, "covers the loss of the use of the finger from the time of the accident occurring." *Santora v. Raby*, Files of the Commission, Claim No. 11473, November 18, 1915.

E. *Loss of use of hand, what constitutes.*—December 23, 1914, the Workmen's Compensation Commission allowed a claimant a

certain number of weeks' compensation for loss of the first three fingers of one of his hands and for mutilation of the fourth finger. More than eight weeks later, it reviewed the case, concluded that these injuries amounted to loss of the use of the hand and increased the claimant's award to the two hundred and forty-four weeks' compensation fixed for the loss of a hand. This it did under authority of the paragraph of Workmen's Compensation Law, § 15, subd. 3, entitled "Loss of use." The Appellate Division unanimously affirmed the increased award in the following opinion:

WOODWARD, J.: There is no dispute that Judge A. Rockwell was injured in the manner and to the extent indicated in the record. On the 23d day of December, 1914, the Commission made a determination that the claimant had sustained a loss of the index finger, for which he was allowed forty-six weeks; that he had lost the second finger, for which he was allowed thirty weeks; that he had lost the third finger, for which he was allowed twenty-five weeks, and that his fourth finger was mutilated, with an allowance of four weeks. This aggregated a total of one hundred and thirty-five weeks at \$11.54 a week, or \$1,757.90.\* No fault is found with this finding. Subsequently, and on the 19th day of February, 1915, the Commission took this case up a second time, and reached the conclusion that the claimant had lost the use of his hand, and made an additional allowance, bringing the time up to two hundred and forty-four weeks. The employer and the insurance carrier appeal from the award as thus made, and urge that the Commission is without power to make more than the awards specifically provided by the statute for the loss of fingers, thumbs, etc.

We are of the opinion that the contention of the appellants is not sound. Recognizing the rules for statutory interpretation suggested by the appellants, we find in the language of the statute ample authority for the action of the Commission. It is true that the statute makes provision for a definite sum for the loss of each particular finger, but it likewise provides in section 15 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) that a "permanent loss of the use of a hand, arm, foot, leg or eye shall be considered as the equivalent of the loss of such hand, arm, foot, leg or eye." Obviously the Legislature contemplated that there would be cases in which the loss of a large portion of the fingers and thumb would produce a "permanent loss of the use of a hand," and the case here under consideration is clearly such a one. The compensation provided for the loss of an index finger, standing alone, may be adequate for that loss, but if the index finger and the two next fingers are destroyed — are lost — and the fourth finger is made practically useless by reason of the bruised and strained condition, there can be no doubt that there has been a "permanent loss of the use of a hand," which is not compensated by the provision which is made for the separate fingers.

\* These calculations appear to be erroneous.

The provisions of the statute which relate to amputation do not give color to the appellants' contention; these are limitations upon the claimant. He is not permitted to claim a loss of an arm because the amputation is made above the wrist; it is the loss of the hand anywhere between the wrist and the elbow. If the elbow is taken, then the amputation is considered as the loss of the arm, but this does not warrant the assumption that the Legislature contemplated that the claimant should be confined to the schedule rate for his fingers, where such loss of all or a major portion of the fingers produced a condition where he suffered a permanent loss of the use of his hand. The hand consists of the palm and the thumb and fingers, and it is not difficult to understand how in many instances the loss of three or four of the members would render the hand absolutely valueless for any practical use, and the statute has provided for just such a case as is now before us. Here there is a complete loss of the index, the second and third fingers, and the fourth finger is stiff and practically useless. Such a hand as that is obviously permanently useless; as much so, practically, as though it were amputated at the wrist, and no good reason suggests itself why the compensation provided for a hand permanently useless should not be paid, rather than the rate established where one of the particular fingers is lost, and where the use of the hand may not be seriously impaired for doing many kinds of labor. We do not recognize the theory that the question of the use of the hand is to be determined by the particular work in which the claimant has been engaged; the act has not attempted to insure the workman in his particular avocation for life. It simply undertakes to compensate for the injury sustained, and the question presented to the Commission is not whether the hand is permanently useless for a particular work, but whether it is useless for any kind of work to which the claimant may be adapted. We have no doubt, however, that where the loss or injury to fingers and thumb result in the permanent loss of the use of the hand in the practical every day work of the individual, the Commission is authorized to recognize this fact and to treat the hand as lost in fixing the compensation. That is the natural and logical meaning of the language, which seeks to do approximate justice to the individual, and it should not be construed to work an injustice in a case such as is here presented.

The award should be affirmed. All concurred. Award affirmed. *Rockwell v. Lewis*, 168 App. Div. 674, July 1, 1915.

In the following and later case, the injured employee lost only his little finger by amputation. The remaining fingers were stiffened by the accident. The Commission, the attorney of the employer assenting, awarded compensation for loss of use of the hand. The employer disavowed his attorney's action and carried the case to the Appellate Division which inclined to the view that the award was erroneous but affirmed it because of the attorney's assent:

SMITH, P. J.: In this case the claimant was injured while wiping the oil and dust off a slitting machine. His right hand was caught between the

rollers, crushing and exposing several bones of his hand, dislocating the phalanges and lacerating the back of the hand and the wrist. By reason of the injury the entire fourth or little finger of the right hand was removed, the remaining three fingers of the right hand were stiffened but were not amputated. The thumb and palm of the hand were uninjured. At the hearing one Mr. Stevens, who represented the defendant, stated: "According to the examination by Dr. McKee it shows the man has lost the entire use of the hand, inasmuch as he is unable to hold any tools. He only has one finger, the thumb, and we have no objection to paying the man for the loss of the use of the hand on that." Thereupon the Commission voted an award for the loss of the use of the hand, which is the award from which the employer and claimant appeal. It is now claimed that claimant did not lose the use of the hand, but only of the four fingers, and that the usefulness of the remainder of the hand, including the thumb, was practically unimpaired. These seem to be the conceded facts. I am not clear that upon these conceded facts the claimant should have been allowed for the loss of the use of the entire hand. While the four fingers were stiffened the thumb was unjured, and the claimant is unquestionably better off than if the hand had been taken off or rendered entirely useless. In my judgment it is unnecessary to determine this, because the award was made by consent of the attorney representing the appellants, and while the appellants afterwards claimed that he exceeded his authority, we are unwilling to interfere with the determination of the Commission that the award should stand. The award should, therefore, be affirmed. Award unanimously affirmed. *Cunningham v. Buffalo Copper and Brass Rolling Mills*, 171 App. Div. 955, November, 1915.

In *Grammici v. Zinn*, S. D. R., vol. 5, p. 400, August 18, 1915, a case of "amputation of several of the fingers of the right hand," the Commission reviewed a previous award and substituted an award for loss of use of the hand. The Appellate Division affirmed the award without opinion, March 8, 1916.

In *Kanzar v. Acorn Manufacturing Co.*, S. D. R., vol. 5, p. 418, October 1, 1915, the injured employee lost part of his hand by amputation and was awarded compensation for loss of use of the hand. The award was affirmed without opinion by the Appellate Division, May 3, 1916. The court was divided and further appeal was taken to the Court of Appeals.

In *Carkey v. Island Paper Co.*, S. D. R., vol. 6, p. 321, November 3, 1915, the Commission ruled that loss of four fingers of a hand constituted loss of use of the hand.

The *Carkey* case is pending in the Appellate Division upon appeal, January, 1917.

On November 28, 1916, the Court of Appeals handed down

decisions reversing the orders of Appellate Division in the above-described Grammici and Kanzar cases on the ground that evidence that use of the hand had been lost was insufficient in the one case and entirely wanting in the other. For the Appellate Division's awards of two hundred and forty-four weeks' compensation for loss of the hand, the Court of Appeals substituted awards of one hundred and eight and one-half weeks for loss of fingers and phalanges. The two decisions of the Court of Appeals are as follows:

(*Grammici v. Zinn*)

COLLIN, J.: The claimant was awarded compensation at the rate of \$5.77 weekly for a period of 244 weeks, for the equivalent of the loss of a hand. The Appellate Division by a decision not unanimous affirmed the award.

The Workmen's Compensation Law (Cons. Laws, ch. 67), in subdivision 3 of section 15, provides three rates of compensation relating to the hand. The compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for (1) the loss of a thumb, sixty weeks; the loss of a first finger, forty-six weeks; the loss of a second finger, thirty weeks; the loss of a third finger, twenty-five weeks; the loss of a fourth finger, fifteen weeks; the loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the specified amount; the loss of more than one phalange shall be considered as the loss of the entire thumb or finger; (2) the loss of a hand, two hundred and forty-four weeks; (3) permanent loss of the use of a hand shall be considered as the equivalent of the loss of such hand. The commission originally awarded one hundred and eight and one-half weeks in accordance with the first rate. Subsequently this determination was vacated and the third rate of two hundred and forty-four weeks was awarded. The appellants assert and argue that, under the facts, the first rate should have been awarded.

Under conditions making the Compensation Law applicable to the injuries, the claimant lost the first, second and third fingers and the first phalange of the fourth finger of his right hand. The evidence of the appellants tended to prove that neither the hand nor the use of it was lost. The evidence came from two physicians and three laymen. There was no contradiction of it unless the statement of a physician that "the hand is useless in his vocation," and that of another physician: "from vocation point of view, I consider this deformity equivalent to the loss of the use of a hand," constitute contradiction. In those statements, there was no contradiction. The fact, if it existed, that the injuries barred the claimant from the employment or the particular occupation or vocation he was engaged in when he received them does not, in and of itself, tend to prove that the hand or the use of it was lost. It is not within the letter or spirit of the law or the legislative intention that an injury to a limb or member of an employee incapacitating him for the particular employment should establish that he was incapacitated for employment permitting or involving the use of the limb or member as injured. It is a matter of



common observation and knowledge that a hand, arm, foot or leg incompetent, through injury, for certain employments is competent and useful for other employments. The expressions, "loss" and "loss of the use," as used in the law, should be given their unrestricted and ordinary meaning. In the case at bar, the hand, or the use of it, was not lost, provided it could fulfill, in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive, its normal and natural functions. In case the hand was destroyed by amputation, directly or indirectly caused by the injuries, to such an extent that it could not thus fulfill its natural functions, it was, within the purview of the law, lost (*Sneck v. Travelers Ins. Co.*, 88 Hun., 94; *affd.*, on opinion below, 156 N. Y. 669.) While the loss of a hand necessarily involves the loss of the use of it, the loss of the use of a hand does not involve the actual loss of the hand as a physical member—a distinction the law recognizes and observes. The question here was whether the first or second rate of compensation should be awarded. The uncontradicted evidence established that the hand was not lost and that the first rate should be awarded.

The order appealed from should be reversed and the original award of one hundred eight and one-half weeks reinstated and affirmed, with costs to the appellants against the commission.

Hiscock, Chase and Cuddeback, J. J., concur; Hogan and Cardozo, J. J., dissent; Willard Bartlett, Ch. J., not voting.

Order reversed, etc. *Grammici v. Zinn*, 219 N. Y. 322, November 28, 1916.

(*Kanzer v. Acorn Mfg. Co.*)

COLLIN, J.: This appeal was argued with that in *Matter of Grammici v. Zinn* (219 N. Y. 322), which is decided herewith. The claimant here, as in the *Grammici* case, was awarded the compensation for the loss of the use of the hand. The award was affirmed by the Appellate Division by a decision not unanimous.

A finding of the commission is that "his (claimant's) left hand accidentally slipped into the press, resulting in a traumatic amputation of the first and second phalanges of the first, second and third fingers, and of the distal phalange of the fourth or little finger of the left hand. By reason of these injuries, Michael Kanzer has lost the use of his left hand."

The record contains the notice to the employer of the injury, made pursuant to section 18 of the law, the report to the commission of the employer of the injury, made pursuant to section 111, the claim for compensation presented to the commission pursuant to section 20, the reports to the commission of two physicians attending the claimant on account of his injuries, and the report to the commission of the physician making the medical examination, pursuant to section 19. Upon the hearing by the commission, pursuant to section 20, no witness was present and called. There is not in the record any evidence supporting the finding of the commission that the claimant had lost the use of his left hand. The brief of the respondent states: "In this case there was no evidence taken. The finding is based upon the reports of the employer, the employee and the medical reports so that there is a presumption under section 21 to sustain

the finding of fact of the commission that the claimant lost the use of his left hand." Section 21 (Cons. Laws, ch. 67) is:

"In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary:

"1. That the claim comes within the provision of this chapter;

"2. That sufficient notice thereof was given;

"3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;

"4. That the injury did not result solely from the intoxication of the injured employee while on duty."

Any presumption thereby created has, manifestly, no relation to the question here, which is, is there any evidence that the claim, which is conceded and unquestionably within the provisions of the chapter, was entitled to the rate of compensation awarded.

Upon the authority of *Matter of Grammici v. Zinn* (219 N. Y. 322), the order should be modified by reducing the award to one hundred eight and one-half weeks, and as so modified affirmed, with costs to the appellants against the commission.

HISCOCK, CHASE and CUDDEBACK, J. J., concur; HOGAN and CARDOZO, J. J., dissent; WILLARD BARTLETT, Ch. J., not voting.

Ordered accordingly. *Kanzar v. Acorn Mfg. Co.*, 219 N. Y. 326, November 28, 1916.

Upon authority of these decisions of the Court of Appeals in the Grammici and Kanzar cases, the Appellate Division on December 29, 1916, reversed the Commission's awards in *Peck v. Onondaga Paper Co.*, S. D. R., vol. 7, p. 445; *Martin v. Roff Underwear Co.*, S. D. R., vol. 7, p. 481; and *Winters v. Wells Bros. Co.*, S. D. R., vol. 9, p. —.

In *Winkless v. Lehigh Valley R. R. Co.*, S. D. R., vol. 8, p. 500, May 16, 1916, the injured employee lost none of his fingers but suffered complete ankylosis of all of them and of the wrist joint. A splinter in his thumb had brought on blood poisoning. The Commission made an award for loss of the use of his hand.

F. *Loss of one-half of a finger, what constitutes.*—Subdivision 3 of Section 15 provides that loss of the first phalange of a finger, thumb or toe shall be equivalent to loss of one-half of the finger, thumb or toe. In the case of a workman whose injury necessitated amputation of one-third of the distal phalange of a finger the Appellate Division, two judges dissenting, affirmed an award for the entire phalange, i. e., for one-half of the finger. The dissenting judges said that compensation for such an injury had been provided for in the paragraph of subdivision 3 entitled

"Other cases." The case having been carried up to the Court of Appeals, appellants argued for strict construction of the Workmen's Compensation Law as in derogation of the common law, and at least, of necessity and in the very nature of things, for strict construction of its schedule of benefits. Respondent argued for broad and liberal construction. The Court of Appeals affirmed the Appellate Division. The decisions of the two courts, including memoranda by dissenting justices in the Appellate Division, are as follows:

*(Petrie Decision, Appellate Division)*

WOODWARD, J.: Thomas Petrie was at work for the Oneida Steel Pulley Company on the 10th day of July, 1914, and was engaged in operating a punch press. His fingers were caught between the punch and die in such a manner that the second finger of the right hand had to be amputated at the first joint. The third finger was injured so that the Commission has found as a fact that in "the amputation of the third finger about one-third of the bone of the distal phalange was cut off." The only question arising upon this appeal is whether this injury to the third finger was such as to entitle the injured man to an allowance of one-half the amount which is provided by the statute for the loss of a finger.

Section 15 of chapter 41 of the Laws of 1914 (Consol. Laws, chap. 67), known as the Workmen's Compensation Law, provides that in the case of a loss of the third finger the injured party shall be entitled to sixty-six and two-thirds per centum of the average weekly wages for a period of twenty-five weeks (Subd. 3), and that "the loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the amount above specified." The Commissioners, finding the fact as above stated, have allowed the injured man one-half of the twenty-five weeks as for the loss of one-half of the finger, and the appellants urge that as only a part of the first phalange was removed the Commissioners erred in awarding for the loss of one-half the finger. It seems to us that this is taking a limited view of the statute and one not justified by its remedial character.

If the statute had simply provided that in case of the loss of the third finger the compensation should be limited to twenty-five weeks the fair construction would have been that the loss of the use of the finger was intended, and that any injury which destroyed the substantial use of the finger would entitle the injured person to the compensation. The statute sought, however, to limit this liability, realizing that every injury permanent in its nature did not operate to destroy the full usefulness of the finger, and so it was provided that "the loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the amount above specified." Without this clause there would have been no other specific provision for the loss of a portion of the finger; there would need to have been a practically complete loss of the use of the finger or there would have been no fixed method of compu-

tation, which would present a situation entirely out of harmony with the general spirit of the act, which sought to make as far as possible a provision for absolutely fixing a just rate of compensation without resort to complicated investigations involving delay and expense.

To get the true spirit of the act we have only to read the "phalange" clause in full, where, after providing that the loss of the first phalange shall "be considered to be equal to the loss of one-half of such thumb or finger," it continues: "The loss of more than one phalange shall be considered as the loss of the entire thumb or finger," etc. That is, the loss of any part of the second phalange, however slight or immaterial, shall be construed as a loss of the entire finger, and yet we are asked to hold that in the case of the first phalange, the destruction must be entire to warrant a holding that this constitutes a loss of one-half of the finger. Obviously the taking of one-half of the second phalange of a finger would not result in the relative loss that the taking of the first half of the first phalange would. After the first phalange is gone, what remains of the second, be it greater or less, is comparatively unimportant, yet the statute clearly and unmistakably provides that where the loss involves "more than one phalange" the loss of the whole finger shall be held to have resulted. This, it seems to us, is a legislative construction upon the clause here under consideration. The substantial injury of the first phalange, requiring amputation, is to be understood as involving the loss of one-half of the finger, and if the injury extends beyond the first phalange then it is to be construed as involving the entire finger. No intelligent reason, we believe, can be suggested why the Legislature should provide that the loss of any part of the second phalange should result in an award for the full value of the finger, while a like substantial injury to the first phalange should not carry an award for one-half of the finger, where the statute has attempted to provide the standard by which the compensation should be awarded, and has provided for an award in the case of one-half the loss of the finger, in connection with a provision for an award for the full loss. The act in effect provides that where the first phalange is lost this shall be construed as the loss of one-half the finger, and if the second phalange (or "more than one phalange") is lost this shall constitute the whole finger, for the purposes of the act. One phalange is the loss of half a finger; more than this is the loss of the other half, and, under the maxim that "Like reason doth make like law" (Broom Leg. Max. [8th ed.] 153; Co. Litt. 10a), it is clear that the Legislature, in providing a detailed schedule including a clause for each finger, intended to exclude all other provisions for compensating for this character of losses, and to fix the reasonable rules for determining the extent of the compensation. Indeed the statute itself provides that the "compensation for the foregoing specific injuries shall be in lieu of all other compensation," and the specific provisions for fingers, toes, etc., must, under the maxim *expressio unius est exclusio alterius*, be deemed to exclude these injuries from the contemplation of the further provision contained in the last paragraph of subdivision 3 of section 15 of the act. "While this maxim will not be permitted to defeat the obvious legislative intent where it conflicts with the letter of a statute, such intent must, nevertheless, be discernible in the context of the statute itself" (*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57), and where it is in harmony with the letter and the spirit of the act it is controlling. There being, therefore, no other provision of the statute for dealing

with the specific losses mentioned in subdivision 3 of section 15, and as it cannot be presumed that the Legislature intended to preclude all recovery where less than the first phalange was lost, it must follow that the intelligent construction of the language here under consideration requires that the determination made by the Commissioners should be confirmed and approved.

Of course a mere pinching of the finger, which does not result in a permanent injury, is not to be construed as the loss of half a finger. No compensation is awarded for the first two weeks (§ 12), except the necessary medical treatment, as provided in section 13 of the act, and it is only "in case of disability *partial in character but permanent in quality*" (§ 15, subd. 3) that the compensation is to be paid, but where there is substantial and permanent injury to the first phalange—an injury involving the removal of a portion of the bone and interfering with the usefulness of the finger in a material way, such as is disclosed on this appeal—such an injury is in law a loss of the first phalange and, therefore, a loss of half the finger.

The award of the Workmen's Compensation Commission should be affirmed, with costs.

All concurred (HOWARD, J., in result), except SMITH, P. J., and KELLOGG, J., dissenting, each in memorandum.

SMITH, P. J. (dissenting):

I am not prepared to hold that an accident which scrapes off one-tenth of the distal phalange as matter of law causes the loss of that phalange. With the statutes of many States before it when this act was passed, the Legislature has provided a certain compensation for the loss of a phalange, and not for the loss of part of a phalange. Notwithstanding the limitation in the statute under that part of subdivision 3 of section 15 which treats of the "loss of use," it seems to me a fair interpretation of the statute must give to a claimant compensation as for the loss of a distal phalange under a finding by the Commission that an injury thereto did cause the substantial loss of the use of that phalange. But there is no such finding in the case at bar, and we are called upon to decide whether the loss of a very small part of a phalange as matter of law constitutes the loss of that phalange, where there is other provision in the statute for compensation in cases not specifically provided for. I vote for a reversal of the determination and the remission of the case to the Commission for their determination of the question of fact as to whether in the case at bar the loss of a portion of the distal phalange has caused the substantial loss of the use of the whole thereof.

KELLOGG, J. (dissenting):

The statute fixes the compensation for particular losses and then provides that in all other cases in this class of disability the compensation shall be sixty-six and two-thirds per centum of the difference between the average weekly wages and the wage-earning capacity thereafter in the same employment, or otherwise, payable during the continuance of such partial disability, etc. The question here, therefore, is not whether there is a compensation for the loss of one-third of the first phalange of the finger, but relates to the particular compensation for the loss. If the first phalange is lost the compensation is fixed; if a lesser injury occurs to the finger the compensation depends upon the loss of earning power. The Legislature has fixed the compensation for the first phalange—not for any part of the first phalange. This means a

substantial loss of that phalange. Here the loss is one-third. If the loss of one-third of the phalange comes within the schedule, perhaps the loss of one-sixth or one-tenth would also be within it. If that was the intention the Legislature could easily have said "for the loss of the first phalange or any part thereof," or "any substantial part thereof." I, therefore, think the claimant is entitled to compensation not for the loss of a phalange, as fixed by the schedule, but under the provision relating to "other cases," which entitles him to be compensated according to the loss of earning power. (See § 15, subd. 3.) Award affirmed. *Matter of Petrie*, 165 App. Div. 561, Jan. 6, 1915.

(*Petrie Decision, Court of Appeals.*)

HISCOCK, J.: This appeal presents to this court for the first time for construction, provisions of the Workmen's Compensation Law (Chapter 816, Laws of 1913). No attack is made upon the constitutionality of the act. The provisions thus presented for construction are those covering compensation for the loss of a phalange of a finger.

While the claimant was in the employ of the appellant, Oneida Steel Pulley Company, he met with an accident which, amongst other things, resulted in injury to and subsequent amputation of part of the first phalange of his third finger, and he thereafter filed a claim for compensation covering such injuries.

The evidence which was presented to the State Workmen's Compensation Commission variously described his injury as the "cutting off \* \* \* the third finger about the middle of the nail," and again, "third finger cut off near the first joint or near root of nail."

The commission found that the claimant's injury resulted in "the amputation of the third finger on the right hand near the first joint," and that "in the amputation of the third finger about one-third of the bone of the distal phalange was cut off," and on these findings an award was made as for the loss of the entire phalange of the finger.

Section 15 of the Compensation Law, which covers this case so far as concerns compensation for injuries, provides: "The loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the amount above specified (for the loss of a thumb or finger). The loss of more than one phalange shall be considered as the loss of the entire thumb or finger." There is also a general provision that "In all other cases in this class of disability (after those specifically enumerated, such as the loss of a phalange), the compensation shall be" at a certain rate fixed in said section.

Under these provisions it is argued by the appellants that compensation can be awarded as for the loss of a phalange only in case the entire phalange has been lost, and that in a case where only part thereof has been lost compensation must be sought under the general clause last quoted.

We are not able to agree with this contention on the evidence and findings made in this case. It very likely may be that the loss might be of such a minor portion of the phalange that an award could not be sustained under the clauses which have been quoted as for a loss of the entire phalange, but that does not seem to be this case. While the findings of the commission are somewhat contradictory and rather unsatisfactory in that they state in one place that the amputation of the phalange occurred near the first joint and in another place that about one-third of the bone of the distal phalange was cut

off, we think that construed together and in the light of the evidence they may be regarded as stating that substantially all of the phalange was cut off, and on that theory the award may be sustained.

The Workmen's Compensation Law was adopted in deference to a widespread belief and demand that compensation should be awarded to workmen who were injured and disabled temporarily or permanently in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law. The underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a workman from being deprived of means of support as the result of an injury received in the course of his employment. The statute was the expression of what was regarded by the Legislature as a wise public policy concerning injured employees.

Under such circumstances we think that it is to be interpreted with fair liberality, to the end of securing the benefits which it was intended to accomplish. Applying these rules to what happens to be in this case an accident of minor importance, we think we should hold that the provisions of the statute providing compensation for the loss of a certain portion of the finger become operative and applicable when it appears that substantially all of the portion of the finger so designated has been lost, and that we should not interpret such provisions too narrowly for the purpose of defeating a recovery. The order should be affirmed, with costs.

WILLARD BARTLETT, Ch. J., CHASE, CUDDEBACK, HOGAN, MILLER and SEABURY, JJ., concur. Order affirmed. *Matter of Petrie*, 215 N. Y. 335, June 15, 1915.

Both of the courts observed in the *Petrie* case by way of reservation that the loss of part of the distal phalange of a finger might be so slight as not to constitute loss of one-half of the finger. The Appellate Division, acting upon this reservation in *Mockler v. Hawkes*, following, set aside an award for loss of one-half of a finger on the ground the loss had amounted to "only the merest shaving of bone." "A liberal interpretation," the court said, "should not go to the extent of becoming an absurd interpretation." The case was remanded to the Commission for further consideration:

HOWARD, J.: The claimant was a girl seventeen years of age. While employed as an operator of a staying machine in the factory of the appellant her "Finger slipped and was caught under head of stayer," the result being that the end of the second finger of her right hand was "squeezed off." This happened October 26, 1914. On November ninth following, just fourteen days afterward, she returned to work. Before the accident she received one dollar and twenty-five cents a day; after the accident she was paid five dollars a week and this wage was to continue until she recovered sufficiently to do her "regular work." She did not go to a hospital, but was treated at home. In the conclusions of fact the Commission has found that "her fingers slipped

and were caught between the anvil and the head of the staying machine, requiring the amputation of the tip of the bone of the second finger of the right hand." But the Commission by the expression "requiring the amputation of the tip of the bone," must have referred to the amputation by the machine rather than any amputation executed by a surgeon's knife, for there is no evidence in the record of any surgical amputation. In fact the opposite is in the record, for the attending physician, in reply to the question, "Describe the treatment," answered "None." In describing the nature and extent of the injury the physician says: "Loss of tip of second finger of right hand." That this description does not minimize the injury is fully confirmed by the X-ray photograph for it is only by careful examination of the picture that any injury at all can be discovered; and, even after the injury is located, it is perfectly apparent that only the merest shaving of bone is gone.

The Commission has determined that the case came within subdivision 3 of section 15 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), which provides that the loss of the first phalange of the finger is considered to be equal to the loss of one-half of the finger, and has awarded compensation for fifteen weeks. That is, the Commission has held that the loss of this slight particle of bone is equivalent to the loss of the first phalange and, therefore, to the loss of one-half of the finger. *Matter of Petrie* (165 App. Div. 561; affd., 215 N. Y. 335) is relied upon to sustain this determination. We do not think that the opinion of this court in the *Petrie* case, nor that of the Court of Appeals, warrants the position assumed or the award made by the Commission in this case. In the *Petrie* case the Commission found as a fact that the claimant's injury resulted in "the amputation of the third finger on the right hand near the first joint;" also that "in the amputation of the third finger about one-third of the bone of the distal phalange was cut off." In this case the finding is that there was an "amputation of the tip of the bone." The findings of the Commission in the *Petrie* case, together with the evidence, convinced the Court of Appeals, and convinced this court, that "substantially all of the phalange was cut off." Assuming then, as both courts did, that substantially all of the first bone of the finger was destroyed, it was held that the injury amounted to the same as a complete loss of the bone. But both courts held that a loss of some portion of the end of the finger might be so insignificant as not to amount to the loss of the entire phalange. On this subject the Court of Appeals said: "It very likely may be that the loss might be of such a minor portion of the phalange that an award could not be sustained under the clauses which have been quoted as for a loss of the entire phalange." And to the same effect this court said: "Of course a mere pinching of the finger, which does not result in a permanent injury, is not to be construed as the loss of half a finger."

The Court of Appeals, as well as this court, in disposing of the questions arising under the Workmen's Compensation Law, has announced a policy of liberal interpretation. But a liberal interpretation should not go to the extent of becoming an absurd interpretation. It could not have been the purpose of the Legislature to enact that a loss of a fraction of the first phalange, so slight as to be scarcely perceptible to the naked eye, should be equivalent to the loss of half the finger.



The last clause of subdivision 3 of section 15 and subdivision 4 of that section provide that in all cases either of permanent partial disability or of temporary partial disability, not otherwise specifically provided for in section 15, the compensation shall be sixty-six and two-thirds per centum of the difference between the average weekly wages of the injured employee and his wage-earning capacity after the accident. This compensation to continue during the disability, subject to certain conditions and limitations. It is under either one or the other of these provisions, according as the Commission may determine the facts, that we think the claim should be disposed of.

Therefore, we conclude that the award should be set aside and the claim remitted to the Commission for further consideration.

All concurred. Award reversed and matter remitted to the Commission for further action. *Mockler v. Hawkes*, 173 App. Div. 323, May 3, 1916.

G. *Loss of use of a finger.*—Injury to a third finger necessitating amputation of part of its distal phalange caused cellulitis of two of its joints, "a permanent deformity" according to the Commission's decision. The question arose whether the consequent entire loss of use of the finger was covered by the paragraph of the Workmen's Compensation Law, § 15, subd. 3, entitled "Third finger" or by the paragraph entitled "Other cases." Compensation would be different accordingly as the one or the other clause might govern. The claimant desired compensation under the "Other cases" paragraph. The State Industrial Commission made award accordingly but withheld payment further than the limited amount fixed for a "Third finger" until the point should be passed on by the courts. *Feinman v. Albert Manufacturing Co.*, S. D. R., vol. 4, p. 65. The Appellate Division, reversing the Commission, construed loss of a finger to include loss of the use of a finger. It cited precedents and pointed out that application of the "Other cases" paragraph might give larger compensation for a useless finger than for a partly or entirely amputated finger, so opening the way to fraud and litigation. The Court's decision is as follows:

WOODWARD, J.: The claimant was employed by the Albert Manufacturing Company as a sewing machine operator in the manufacture of underclothing. While thus employed on or about the 11th day of September, 1914, she was accidentally injured by a needle puncturing her third finger, followed by blood poisoning, which necessitated the amputation of the third finger of her left hand at the first phalange. This appears to have been followed by cellulitis of the joint, so that the third finger has become practically useless. The Commission appears to have had the claim before it on various occasions, making allowances and holding the same open for further consideration, with

the result that the claimant has been paid for the injuries to this finger the statutory allowance for twenty-five weeks, the full compensation provided for the total loss of a third finger, and at the last recorded hearing of the Commission, taken on the 26th of April, 1915, the claimant was awarded ten dollars and twenty-six cents and the claim department was instructed to hold this case in abeyance until the appeal is decided by the courts, when the case should be placed upon the calendar for the total amount of the disability. The theory of the claimant, which seems to be shared by the Commission, is that the finger not having been actually severed above the first phalange, the claimant has not lost the third finger, but that she is to be considered as coming within the provisions of that part of subdivision 3 of section 15 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) which provides for "other cases," and which provides that "In all other cases in this class of disability, the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest."

The result of this contention, if acquiesced in, would be that where a person has lost the entire use of a finger, only a portion of which is amputated, he would be entitled to a larger compensation (or might be) than one who has suffered the absolute amputation of the entire finger. The law in that case provides that the compensation shall be sixty-six and two-thirds per centum of the average weekly wages for a period of twenty-five weeks (§ 15, subd. 3), while if this injury, resulting in the amputation of the first phalange, and the practical uselessness of the remainder of the finger, is held to bring the case within the "other cases," the claimant may go on indefinitely drawing sixty-six and two-thirds per centum of her average weekly wages. We cannot believe the Legislature has intended such a result.

The argument is that the Legislature having provided for specific compensation "for the loss of a third finger," and having specially provided that the "permanent loss of the use of a hand, arm, foot, leg or eye shall be considered as the equivalent of the loss of such hand, arm, foot, leg or eye," the statute is to be construed so as to exclude a case like the present, where a portion of the finger has been amputated and the remainder of the finger has become useless. We think this is not the true construction of the statute; that "loss of a third finger" may be just as real where it is rendered wholly useless as though it had been physically taken away, and that the law does not contemplate payment for a third finger in excess of the sum which is provided for the loss of an entire finger under any circumstances, where the injury does not extend beyond the finger. The statute liberally provides that the loss of one phalange shall be equivalent to the loss of one-half of the finger, and that the loss of more than one phalange shall be equivalent to the loss of an entire finger, and this court has given a liberal construction to these provisions; but now it is proposed to establish the rule that if one phalange is amputated and the remainder of the finger is thereby rendered useless, there has not been a loss of the finger, and that it is not, therefore, covered by the specific provisions of the statute. In other words, we are asked to hold that the word "loss," as used in the statute, requires the actual

amputation of the finger, and that in the absence of such amputation the claimant is entitled, or may be, to have more compensation than would be the case if the member was severed. If this is true, then if the claimant had had the first phalange and a slight portion of the second phalange removed, although the same result had followed to the remainder of her finger, she would be limited to the amount fixed for the loss of an entire finger, but because the surgeon saved a half inch more of the finger she claims to be entitled to compensation because of a permanent partial disability, which is certainly not greater than would have been the case if a half inch more had been taken away.

The courts of this State, in construing policies of insurance, have not given such a narrow construction to the word "loss," and we are of the opinion that the contention of the claimant cannot be sustained without discrediting the system, for it opens the way to fraud. In *Sneck v. Travelers' Ins. Co.* (88 Hun. 94) the policy under consideration provided that "if loss by severance of one entire hand" should result from bodily injuries, arising from causes enumerated in the policy, the insured should become entitled to receive one-third of the face of the policy in lieu of a weekly indemnity of ten dollars for a period not exceeding twenty-six weeks. The trial of the case disclosed that anatomically considered, about one-half of the plaintiff's hand had been cut off by a planer, while the remainder of the hand was rendered useless as a hand, or at least there was testimony which would have warranted the jury in so finding, but the trial court ruled that as there had not been a loss by severance of the entire hand the plaintiff was not entitled to recover under the policy. Upon appeal to the General Term the court held that inasmuch as some men might conclude from the evidence that, for all practical purposes to which a hand is adapted, there was an entire loss of the use thereof, while others might consider that neither in its anatomical construction nor in its practical use as a hand was it entirely destroyed, the question was one of fact for the jury; and that it was erroneous for the court to decide it as a matter of law. This case went to the Court of Appeals, where it was affirmed on the opinion below. (156 N. Y. 669.) In that case a contract was under consideration, and the ruling was in favor of the plaintiff, and while it did not hold that the question presented was one of fact, it is to be observed that the contract provided for a case of "loss by severance of one entire hand," while in the statute now under consideration it merely provides for the case of "the loss of a third finger," and the statute provides that the loss of more than one phalange shall constitute the loss of the entire finger. Where there has been an actual amputation of a portion of the first phalange, and this has rendered the remainder of the finger useless as a finger, it seems to us as a matter of law that there has been a loss of the entire finger, for it is the "loss of more than one phalange," and this the statute itself declares to be equivalent to the loss of the entire finger.

In the case of *Sheanon v. Pacific Mutual Life Ins. Co.* (77 Wis. 618), cited with approval in *Sneck v. Travelers' Ins. Co.* (*supra*), where the plaintiff was shot in the back while attempting to escape from a fight which had been started by third persons, resulting in immediate paralysis of both legs, the court in holding that the insured had suffered "the loss of two entire feet," within the meaning of the policy, says: "To our minds the loss of the hands and

feet embraced in the policy is an actual and entire loss of their use as members of the body; and if their use is actually destroyed, so that they will perform no function whatever, then they are lost as hands and feet. In ordinary and popular parlance, when a person is deprived of the use of a limb, we say he has lost it. This is the ordinary sense attached to the word when used in such a connection. \* \* \* The expression 'loss of feet,' would generally be understood to mean a loss of the use of these members; and if the lower portions of the plaintiff's body and his feet are completely paralyzed, and he is permanently and forever deprived of their use, he has suffered 'a loss of two entire feet' within the meaning of the policy. This is the proper construction of the words of the contract. It is a forced and unnatural construction of the language, as here used, to hold that it means an actual amputation of these limbs, and does not embrace and include an entire deprivation of their use as members of the body." In the case at bar a reasonably liberal construction gives the claimant the benefit of the loss of a third finger, where she still retains a considerable portion of it, which may be of more or less use to her; but to extend this construction to enable her to get more for this useless finger than she would be entitled to if the judgment of the surgeon had called for taking away a trifle more of the finger is absurd, and opens the way to fraud and litigation, where it was the purpose of the statute to eliminate both.

The award and order appealed from should be reversed and further compensation denied. All concurred. Award reversed and further compensation denied. *Feinman v. Albert Manufacturing Co.*, 170 App. Div. 147, November 10, 1915.

On the opinion in the Feinman case the Appellate Division reversed without opinion the awards in *O'Neil v. West Side Storage Warehouse Co.*, 171 App. Div. 960, November, 1915, and *Possner v. Smith Metal Bed Co.*, S. D. R., vol. 3, p. 387, March 30, 1915; 171 App. Div. 960, November, 1915.

H. *Loss of a finger.*—Following the reasoning in the Petrie and Feinman cases, the Appellate Division has held that loss of the first phalange and part of the second phalange of a finger constitutes total loss of the finger. The brief opinion is as follows:

PER CURIAM: The claimant in the present proceeding has an award as for the total loss of the index finger of his left hand, the amputation made necessary by the injury resulting in the taking of a portion of the second phalange of the finger. Unless this court is to withdraw from the deliberate reasoning in *Matter of Petrie* (165 App. Div. 561), where we attempted to reach the true construction of the statute,\* the determination of the Commission must be approved in this case. We are the more willing to reach this conclusion in view of the fact that any other construction would require a holding that this injury comes within "other cases," as defined in the statute,\* and might

\* See Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), § 15, subd. 3.—[Rep.]

result, as was claimed in *Matter of Feinman v. Albert Manufacturing Co.* (170 App. Div. 147), decided at the present term, in a continuing liability largely in excess of that provided by the statute for the entire loss of a finger. We think the appellant would not care to have the rule extended beyond the limitations which are being worked out, and it is not the policy of the law to involve claimants or insurance carriers in uncertain liabilities. The award should be affirmed. Award unanimously affirmed. *Fortino v. Merchants' Despatch Transportation Co.*, 171 App. Div. 955, November, 1915.

I. The "Other cases" paragraph.—Subdivision 8 of section 15 of the Workmen's Compensation Law allows compensation for a series of specific injuries causing permanent partial disability, such as loss of a thumb, a toe or an eye, limits the compensation in each such case to a fixed number of weeks and then by a general clause declares that in all other cases of permanent partial disability "the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the commission on its own motion or upon application of any party in interest." By contrast with the time-limited compensation for the specific injuries, the compensation for injuries under this general clause is indeterminate. There is uncertainty as to just what injuries are to be classed as "Other cases." In the opinions set forth immediately above, the courts rejected the applicability of the "Other cases" paragraph. In *Matter of Petrie*, p. 290, the Court of Appeals, contrary to the minority opinions of two Appellate Division justices, held that the "Other cases" paragraph was not applicable to loss of part of a distal phalange. In the *Feinman* and *Fortino* cases, the Appellate Division unanimously rejected propositions that a finger rendered useless or amputated in part comes within the "Other cases" paragraph. The rejection was put upon the ground that such a construction might give a claimant losing part of a finger greater compensation than a claimant losing an entire finger.

The *Shinnick*, *Connors* and *Wagner* cases immediately following involve not only interpretation of the "Other cases" paragraph but the larger question of the completeness of protection afforded to an employer who has complied with the Workmen's

Compensation Law. This larger question has since been decided by the Court of Appeals in *Shanahan v. Monarch Engineering Co.*, below, p. 321.

In *Shinnick v. Clover Farms*, the Appellate Term of the First Department, Supreme Court, made no reference to the "Other cases" paragraph and declared Workmen's Compensation Law, § 15, inapplicable to the injury. The court said:

GUY, J.: The action is by employee against employer to recover damages for injuries sustained November 14, 1914, by a bite from a horse, necessitating the amputation of part of plaintiff's left ear.

The defendant demurred on the ground that the complaint does not state facts sufficient to constitute a cause of action. It is conceded that under the law as it was prior to July 1, 1914, the complaint would not be demurrable; but the specific objection is made that as it appears the injuries were received in a hazardous employment, as defined in the Workmen's Compensation Law (Laws of 1914, chap. 41), in the absence of an allegation that the master has failed to secure the payment of compensation for his injured employees, a cause of action is not alleged.

Section 10 of the statute invoked provides for the payment of compensation for "disability or death" of employees resulting from accidental personal injuries, and section 11 states that "The liability prescribed by the last preceding section shall be exclusive, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents, as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, \* \* \* or that the injury was due to the contributory negligence of the employee."

Section 15 contains a schedule of compensation for various disabilities, including the loss of a finger, hand, arm, foot, leg and eye — that is, the loss or impairment of the use of a member of the body which is of valuable assistance in the performance of labor. But the statute does not provide any rate of compensation for injuries which may not disable the employee, but which may constitute injury to him through disfigurement or otherwise, as by the loss of an ear or the nose.

The defendant admits that the plaintiff has lost a part of his ear as a result of the defendant's negligence; and as it cannot be assumed that the legislature, in enacting the beneficent provisions of the Workmen's Compensation Law, intended to deprive an employee of the right to recover damages for injuries not constituting disabilities within the meaning of the statute, the order must be affirmed, with ten dollars costs and disbursements.

Order affirmed, with ten dollars costs and disbursements, with leave to the defendant to withdraw the demurrer and answer within six days after service of a copy of the order entered hereon in the City Court upon payment of costs in this court and in the court below.

BIJUR and PENDLETON, JJ., concur.

Order affirmed, with ten dollars costs, with leave to defendant to withdraw demurrer within six days after service of copy of order upon payment of costs. *Skinnick v. Clover Farms Co.*, 90 Misc. 1, April, 1915.

On appeal the Appellate Division of the First Department, affirming the Appellate Term's decision, specifically mentioned and rejected the "Other cases" provision. The court said:

SCOTT, J.: The action is brought under the Employers' Liability Act\* and the complaint alleges that plaintiff was in defendant's employ as a driver engaged in driving a three-horse vehicle; that one of the horses was vicious and accustomed to attack and bite mankind, and known by defendant to do so; that on November 14, 1914, the horse attacked and bit plaintiff in the left ear, as a consequence of which the plaintiff has suffered permanent injuries, a part of his left ear having been amputated. The demurrer is for general insufficiency. It is conceded that the complaint would be proof against demurrer except for the provisions of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1913, chap. 816, as re-enacted and amd. by Laws of 1914, chap. 41, and amd. by Laws of 1914, chap. 316), which as defendant contends affords the only remedy to which plaintiff may resort. As pointed out in the dissenting opinion of Mr. Justice INGRAHAM in *Gropp v. Great Atlantic & Pacific Tea Company* (141 App. Div. 372, 377; judgment reversed on said dissenting opinion, 205 N. Y. 617), an action for damages resulting from an injury by a vicious animal is not based upon negligence, but that is not important in this case because the compensation provided for in the Workmen's Compensation Law is not dependent upon the negligence of the employer. Section 10 of the act provides that "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury. The ensuing exceptions are not material to this discussion. Section 11 of the act (as amd. by Laws of 1914, chap. 316) provides that "The liability prescribed by the last preceding section shall be exclusive, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case of death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury." There is no allegation that defendant has failed to secure the payment of compensation for his injured employees or their dependents as provided in section 50 of the act (as amd. by Laws of 1914, chap. 316), or that plaintiff has, for that reason, elected to sue in the courts. The question we have to consider, therefore, is whether the Workmen's Compensation Law provides compensation for such an injury as that which plaintiff has suffered.

As already said, under section 10 of the act the liability to which an

\* See Labor Law (Consol. Laws, chap. 31; Laws of 1909, chap. 36), art. 14, as amd. by Laws of 1910, chap. 352.—[Rep.]

employer is subjected by the act is to "pay or provide \* \* \* compensation according to the schedules" contained in the act. If the schedules do not cover the injury suffered by an employee he does not fall within the purview of the act and cannot claim compensation under it, for the act provides no scale or gauge by which to determine what compensation should be provided. As to such an injury, therefore, the right to recover remains as it was before the act was passed. The schedules referred to in section 10 are to be found in section 15 and include, with considerable detail, a great number of injuries such as frequently result from accidents in industrial pursuits and such as tend to impair temporarily or permanently, wholly or partially, the ability of the injured employee to pursue his avocation. There is no mention in the schedules of an injury to or the loss of a part of an ear. It is true that it is provided generally, after the specific enumeration of the injuries covered by the act, that "In all other cases in this class of disability" the compensation shall be a percentage of the difference between the average weekly wages and the wage-earning capacity thereafter, "payable during the continuance of such partial disability." We do not consider that such an injury to the ear as the plaintiff complains of is of the same class of disability as those specified in the schedules. The latter are all disabilities tending to impair the efficiency of the injured person in the occupation in which he was engaged such as the loss of a hand or a finger, a foot or a toe. A bitten or even a partially amputated ear would not have such a tendency. Furthermore, the plaintiff's right to recover upon the facts stated in his complaint will not depend upon his employment by defendant, for any one not so employed if injured by a vicious animal known to its owner to be vicious would have an action for damages. Our conclusion, therefore, is that the injury for which plaintiff seeks to recover is not covered by the Workmen's Compensation Law, and that the complaint states a good cause of action.

The determination of the Appellate Term is, therefore, affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the courts below.

INGRAHAM, P. J., CLARKE, DOWLING and HOTCHKISS, JJ., concurred.

Determination affirmed, with ten dollars costs and disbursements, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the courts below. *Shinnick v. Clover Farms Co.*, 169 App. Div. 236, July 9, 1915.

The Appellate Division handed down the *Shinnick* decision, July 9, 1915. Four days later the Court of Appeals handed down the *Jensen* decision. Eight months later, upon the ground that the *Jensen* decision had overruled the *Shinnick* decision and had upheld the exclusive character of compensation under the Workmen's Compensation Law, Justice Andrews of the Supreme Court, in *Connors v. Semet-Solvay Co.*, a case of disfigurement, refused to follow the *Shinnick* decision and sustained a demurrer to the complaint in an action for damages. The cases differ in



that Shinnick had not secured an award of compensation before bringing his liability action while Connors had obtained compensation for certain injuries and then had proceeded to sue on account of disfigurement, pain and suffering. They differ also in that the element of pain and suffering did not figure in the Shinnick case. The Connors decision is as follows:

ANDREWS, J.: The demurrer to the complaint must be sustained, with costs.

The question clearly raised in this case is whether, notwithstanding the Workmen's Compensation Law and the compliance with all the provisions therein contained on the part of the employer, the employee engaged in one of the hazardous employments specified, claiming to be injured by his employer's negligence, may recover by action compensation for personal disfigurement and for pain and suffering.

After the decision in *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, the Constitution was amended by the insertion therein of a provision which stated, among other things, that nothing contained in the Constitution should limit the power of the legislature to provide that the right of compensation to employees for accidental injuries and the remedy therefor "Shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries." The power to enact such a law is here expressly conferred.

Thereupon chapter 41 of the Laws of 1914 was adopted.

It begins: "Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments." § 2. Not certain injuries. The intention is to provide, as the Constitution permits, for all the injuries suffered because of an accident.

"Every employer subject to the provisions of this chapter," that is, every employer engaged in a hazardous occupation, "shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury." § 10. The schedules referred to cover all cases of disability — total permanent disability, temporary total disability, permanent partial disability, temporary partial disability.

"The liability prescribed by the last preceding section shall be exclusive, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee \* \* \* may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury." § 11. An "exclusive liability" hardly needs definition. If, however, the master fails to secure compensation, an option is offered to the servant. He may claim compensation under the act, such compensation as the act offers; or he may sue for damages, including damages for pain and suffering. He cannot do both.

"The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or be requested by the employee, during sixty days after the injury." § 13.

"Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation." § 14. Compensation — not partial compensation — for the injury.

Section 15 establishes the schedule of compensation. Where there is permanent partial disability certain specific injuries are enumerated and compensation provided therefor "in lieu of all other compensation;" and then compensation is fixed generally for "other cases in this class of disability," or, as I interpret it, other cases of permanent partial disability.

It is true the words "in lieu of all other compensation" seem unnecessary if the interpretation given by me to the statute is correct, but it is not inconsistent therewith.

If a workman entitled to compensation under this chapter is injured by the negligence of another not in the same employ, the workman shall elect whether to take compensation under this chapter or to pursue his remedies against the other. If he elect to take compensation under this chapter his cause of action against the other shall be assigned to the state for the benefit of the state insurance fund or to the insurance carrier. § 29. Under such circumstances the servant clearly could not recover of his master for pain and suffering. What he recovers is compensation under the act. Nor could he recover for such injuries against the third party. His whole cause of action against the latter is assigned to the insurance carrier.

An employer shall secure compensation to his employees either by insuring in the state fund or in an insurance corporation or by furnishing satisfactory proof of his financial ability to pay compensation himself.

The failure to secure the payment of compensation shall have the effect of enabling the injured employee to maintain an action for damages in the courts. § 52.

"An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the state fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier." § 53. It is not possible that a distinction, without reason, is here sought to be made between one who insures in the state fund and others who insure as the statute equally permits. The purpose of insurance is to secure a fund which will protect the servant. In either case this is equally accomplished. There is no purpose to be served in holding the servant may not recover for pain and suffering, if the state is the insurer, yet may do so if a corporation is the one liable. In fact the Court of Appeals seems to have passed upon this question. "An employer securing payment of compensation by contributing premiums to the said fund is thereby relieved from all liability for personal injuries or death sustained by his employees and a similar relief from liability

is obtained by the employer by payment of the compensation by himself or an insurance carrier." *Matter of Post v. Burgess & Gohlke*, 216 N. Y. 544.

In view of these sections of the statute it seems to me that the legislature plainly intended to take advantage of the amendment to the Constitution and to provide a remedy for the benefit of injured employees, exclusive of all other rights and remedies. The wrong which it sought to obviate was the constant litigation between master and servant with the uncertainty of its results. The act was designed to allay class feeling, to protect the master against annoyance and unjust verdicts, to see that the employee injured by the hazards of the business, and those dependent upon him, should not, as so often happened, bear the whole loss. Both gave up something. The master was no longer free if the servant failed to prove that the accident happened because of his negligence or negligence attributable to him. The right of the servant, on the other hand, to recover was limited and defined.

The whole object and purpose of the legislature would be overthrown if the servant might, after obtaining compensation from his master, as provided by the statute, then sue in the courts for further compensation because of disfigurement or pain and suffering.

My attention has been called to *Shinnick v. Clover Farms Company*, 169 App. Div. 236. I agree with the plaintiff that that case sustains his views. It is true that towards the end of the opinion the court states another reason for reaching the conclusion which it did. But clearly the Appellate Division of the first department unanimously held that the plaintiff's contention is correct. That decision, however, was made on July 9, 1915.

On July 13, 1915, the Court of Appeals handed down an opinion in *Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514. The case in the Court of Appeals was not and could not have been referred to by the Appellate Division. It seems to me that the decision of the Court of Appeals is made upon the theory that the Compensation Law provides a remedy for the employee engaged in the employments enumerated therein which is exclusive and in full substitution for any action for damages. I think, therefore, that it overrules the case of *Shinnick v. Clover Farms Co.*, and should be followed by this court. Ordered accordingly. *Connors v. Semet-Solvay Co.*, 94 Misc. 405, March, 1916.

In *Wagner v. American Bridge Co.*, decided by the Appellate Division of the Second Department, Supreme Court, May 12, 1916, a machine guard flew off and struck the employee on the head, causing permanent total loss of hearing in one ear. The employee brought an action for damages. The court overruled the plaintiff's demurrer to a separate defense that the employer had secured compensation in accordance with the Workmen's Compensation Law, drew a distinction between loss of hearing and disfigurement and declared the "Other cases" paragraph applicable to the injury. Concerning Workmen's Compensation

Law, § 15, the court remarked: "The particular injuries set out in the schedule are merely examples to aid in administering the statute. The enumeration does not profess to be exclusive."

The full text of the decision is as follows:

PUTNAM, J.: The Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) requires the employer (§ 2) to provide compensation for injuries sustained, or death incurred, by the employees engaged in the enumerated hazardous employments, including under group 21 the manufacture of structural steel — in which this plaintiff was employed.

By section 10, every employer, subject to the provisions of this chapter, is to pay, or provide, compensation according to the schedule of article 2 for the disability or death of his employee resulting from an accidental personal injury sustained by the employee "arising out of and in the course of his employment," without regard to fault as a cause of such injury. Such liability for compensation is declared to be "exclusive," unless the employer fail to secure the statutory compensation as provided under section 50,\* when the injured employee "may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury." (§ 11, as amd. by Laws of 1914, chap. 316.) The ordinary tort rule of "no liability without fault" sufficed for the earlier and simpler relations of employment. But the increasing loss of life and limb in modern industrialism enabled us slowly to grasp the humane idea of liability merely from the nature of the work. As the perils of a seaman's life give him the right to cure and maintenance at the expense of the ship (*The Osceola*, 189 U. S. 159), so the employer in the specified trades, as an incident of his enterprise, must compensate his workmen for their injuries in the employment. The prior right to sue gives place to this substitute, to be administered without the expense, uncertainties and delay of litigation involving the risk of defeat if unable to make out actionable negligence. This new remedy is constitutional. (*Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514.)

The point of the demurrer, therefore, is whether this statute affords compensation for an accidental personal injury sustained by the employee in the course of his employment which results in permanent total deafness in one ear.

Section 15 establishes a schedule of compensation in terms of the average weekly wages for different classes of injuries, viz.: (1) Cases of total permanent disability; (2) temporary total disability; (3) permanent partial disability; and (4) temporary partial disability. Under the class of permanent partial disability are enumerated losses of different bodily members, with a scale of compensation measured by wages, varying according to the degree of injury and deprivation. Then follows:

"Other cases. In all other cases in this class of disability [i. e., permanent partial disability], the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable

\*Amd. by Laws of 1914, chap. 316—Rep.

during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest."

The employer, or his insurer, is to provide compensation for all personal injuries that involve permanent or temporary disability, whether total or partial. The particular injuries set out in the schedule are merely examples to aid in administering the statute. The enumeration does not profess to be exclusive.

The jurisdiction to construe the Workmen's Compensation Law ordinarily is exercised through appeals from the decision of the Workmen's Compensation Commission or of its successor, the State Industrial Commission. (§ 23.) Nevertheless it arises here incidentally. On these pleadings we cannot hold that the injury sued for is excluded from the terms of that statute. Hence, on demurrer, this defense is not on its face insufficient.

*Shinnick v. Clover Farms Co.* (169 App. Div. 236), relied on below, was where a horse had bitten an employee's ear, causing a part to be amputated. Although this left a disfigurement, it did not impair the injured person's efficiency, and, therefore, his injury did not come in the class of scheduled disabilities. However, total deafness, the gravamen of this complaint, obviously impairs plaintiff's industrial efficiency. The amount and extent of this disability as gauged by the wage-earning capacity could be ascertained in like manner as other disabilities which now are being compensated by the Commission.

The order should be reversed, with ten dollars costs and disbursements, and the plaintiff's demurrer overruled, with ten dollars costs.

JENES, P. J., CARR, STAPLETON and RICH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and demurrer overruled, with ten dollars costs. *Wagner v. American Bridge Co.*, 172 App. Div. 876, May 12, 1916.

In L. 1916, ch. 622, the Legislature, without waiting for decisions of the higher courts, undertook to cure the doubts and defects revealed by these cases. It inserted in Workmen's Compensation Law, § 15, subd. 3, a clause providing compensation for disfigurement. Its amendments to other parts of the law, notably to § 11, were claimed by the friends of the State Fund to completely shut out suits for damages against employers insured in compliance with the Workmen's Compensation Law.

In *Saccaccio v. Bradley Contracting Co.*, S. D. R., vol. 6, p. 410, January 26, 1916, the employee received an injury to, but did not lose, his eye. Compensation could not therefore be awarded under the paragraph "Eye. For the loss of an eye, one hundred and twenty-eight weeks." The question became one of permanent impairment of vision. The experts did not agree as to the percentage of injury. The Commission closed the case by

making an award of "twenty-three weeks impaired earnings," which expression would seem to indicate that the award was made under the "Other cases" paragraph. Certain Commission rulings indicate that the paragraph applies in cases of reduced earning power due to traumatic hernia. For instance, in *Mike v. Glens Falls Portland Cement Co.*, S. D. R., vol. 7, p. 435, the Commission said:

The insurance carrier should provide him a truss and claimant should resume work such as he can do. Compensation should be brought up to date and claimant be directed to work and appear in, say, one month to have his reduced earning capacity determined.

And in *Neuner v. Hanschman*, S. D. R., vol. 8, p. 500, the Commission said:

Neuner wore a truss and was able to continue working until December 9, 1915, and he had to then quit work because it proved too hard for him. He then obtained another position in the same line of business with a different employer at wages of twenty dollars per week, which was two dollars per week less than he had been receiving from Hanschman. In order that Neuner may hold his present position, he pays one dollar per week and his employer pays one dollar per week to another employee to do the heavy lifting which would ordinarily be required of Neuner but which he is not now compelled to do owing to his inability to lift in his present condition.

The difference between the wage earning capacity of Neuner at the present time and his average weekly wages at the time of the accident is the sum of two dollars per week.

Award of compensation is hereby made against Adolph Hanschman, employer, and Zurich General Accident and Liability Insurance Company, Limited, insurance carrier, to John G. R. Neuner, employee, at the rate of one dollar and thirty-three cents weekly, for a period of three weeks from December 23, 1915, to January 13, 1916, and the claim is hereby continued for further hearing.

## DEATH BENEFITS AND DEPENDENCY

(Workmen's Compensation Law, §§ 16, 17, 25)

A. *Dependents, who are.*—Section 16 of the Workmen's Compensation Law provides benefits for the dependents of employees whose injuries result in death. The benefits are absolute as concerns the surviving wife and the surviving children under eighteen but are contingent upon dependency as concerns the surviving husband, the grandchildren, brothers or sisters under eighteen, and the parents and grandparents. The Commission has granted death benefits to a wife married to an injured employee after the occurrence of his injury: *Crockett v. International Ry. Co.*, 170 App. Div. 122, November 10, 1915.\* No provision is made for dependent adults, other than parents or grandparents, such as invalid children, brothers or sisters over eighteen or non-relatives. Section 3, subdivision 11, extends the benefits to posthumous and adopted children and step-children. An amendment to this subdivision effected by L. 1916, ch. 622, brought step-children within its coverage. In a case decided in July, 1915, the Appellate Division had held without opinion that a step-child was not entitled to its benefits: *Morrissey v. N. Y. Rys. Co.*, 170 App. Div. 926. In *Berger v. Shadboldt Manufacturing Co.*, S. D. R., vol. 8, p. 460, April 27, 1916, the Commission ruled that an illegitimate child was not a dependent within the meaning of the Workmen's Compensation Law.

B. *Common law marriage.*—A few cases worthy of notice have arisen relative to surviving wives and children. Questions of bigamy, wifehood and common law marriage figured in the case of an Italian woman whose claim for compensation was rejected by the State Industrial Commission: *Salvadori v. Interborough Rapid Transit Co.*, S. D. R., vol. 5, p. 438. Similarly, meretricious relations caused denial of an award in *McNeill v. Hogan & Sons*, S. D. R., vol. 7, p. 469. A divorced wife who was entitled to alimony of six dollars a week from a husband who had been

\* Connor's Employers' Liability, Workmen's Compensation and Liability Insurance, p. 128. Compare remarks of Chairman Mitchell of the State Industrial Commission, Monthly Bulletin of the Department of Labor, June, 1916, p. 18. The Appellate Division decision in this case appears below, p. 398.

forbidden to remarry and the co-respondent in the divorce action who had been living with the husband for twenty-four years and had a sixteen-year-old son by him were both denied compensation in *Berger v. Shadboldt Manufacturing Co.*, S. D. R., vol. 8, p. 460, April 27, 1916. On the other hand, an award of compensation to a common law wife was unanimously affirmed by the Appellate Division without opinion in *Ziegler v. Cassidy's Sons*, S. D. R., vol. 4, p. 343, March 30, 1915; 171 App. Div. 959, November 10, 1915.\* The question of compensation awards to illegitimate children is pending, January, 1917, in the cases of *Bell v. Terry & Tench Co.* and *Tremberger v. Pape & Co.* The Bell case has been certified to the Appellate Division. In the Tremberger case, the wife having been awarded two years compensation upon remarriage has applied to the Commission for reconsideration of this award upon the ground that her remarriage with a bigamist was illegal.

C. *General guardian for minors not necessary.*—In another case, the question of the proper person to receive the compensation of minor children, whether the mother or a general guardian, was certified to the Appellate Division and unanimously decided in favor of the mother. The court said:

SMITH, P. J.: The employer and insurance carrier stand neutral upon this question. All parties simply desire an interpretation of the law, that it may be determined to whom the moneys allotted to the infant children of the deceased shall be paid. Section 16 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1914, chap. 316) provides that "If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following: \* \* \*

"2. If there be a surviving wife \* \* \* thirty per centum of the average wages of the deceased during widowhood \* \* \*; and if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until of the age of eighteen years."

This provision of the statute would seem to authorize the payment to the wife not only of her thirty per cent, but of the additional amount which is allotted for the support of the several children. This conclusion is supported by the provision of section 20 of the Workmen's Compensation Law (as amd. by Laws of 1915, chap. 167), which authorizes the wife as the principal dependent to make an agreement with the employer, subject to the approval of the Commission, as to the payment of the award both to herself and for her children. There is no other provision in the act as to the payment of the

\* Affirmed by Court of Appeals with opinion, Feb. 27, 1917.



award to infant children, and it does not seem probable that it was the intention of the Legislature to require the appointment of a general guardian with an attendant expense in order to enable the children to collect the amounts allotted to them under the act. Under the Domestic Relations Law (Consol. Laws, chap. 14 [Laws of 1909, chap. 19], § 80), in regard to real estate, if there be no general guardian the mother is the general guardian of the infants. This law by analogy tends to support the construction thus given.

All concurred. Question certified answered in the affirmative. *Woodcock v. Walker*, 170 App. Div. 4, November 10, 1915.\*

D. *Dependents, not administrator, to make election.*—Further, the Appellate Division has declared that the dependents, and not an executor or administrator, are the proper party to make the election between an action for damages and a claim for compensation, that is permitted where an employer has failed to secure a compensation, and has suggested that the Commission's rules should decide how several dependents may make the election "where some elect one course and some another," *Dearborn v. Peugeot Auto Import Co.*, 170 App. Div. 93, November 10, 1915.†

E. *No wife, husband or child surviving.*—Death benefits may not exceed in the aggregate sixty-six and two-thirds per cent of the decedent's wages or sixty-six and two-thirds dollars per month. Precedence belongs to the widow or widower and the children. If their fixed percentages do not exhaust the sixty-six and two-thirds per cent, each other beneficiary is entitled to not to exceed fifteen per cent. The Appellate Division has decided that dependents of the second order may take compensation, even though the decedent has left no surviving wife, husband or child. The court said:

SMITH, P. J.: Two questions are raised by this appeal. The deceased was a young man eighteen years of age, boarding with his parents, to whom he gave ten dollars a week. He was unmarried. It is first contended that under section 16 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1914, chap. 316) the parents are not entitled to compensation, because the deceased left no surviving wife or child. The section assumes to describe who are entitled to death benefits. The 1st subdivision refers to funeral expenses. The 2d subdivision provides that if there be a surviving wife she shall receive thirty per centum of the average wages of the deceased during widowhood, and surviving children

\* L. 1916, ch. 622, has amended Workmen's Compensation Law, § 16, subd. 2, to give the State Industrial Commission discretionary power for appointment of a guardian to receive the compensation of a minor child.

† For the full text of the opinion in the *Dearborn* case, see p. 233.

shall receive in some cases each ten per cent of such ages, and in other cases fifteen per cent, providing in all cases that the total amount payable shall in no case exceed sixty-six and two-thirds per cent of such wages. Subdivision 3 provides for a surviving child or for surviving children where there is no surviving wife, and in that case it is also provided the aggregate shall in no case exceed sixty-six and two-thirds per cent of the wages. Subdivision 4, upon which arises the question here litigated, reads: "If the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages, for the support of each such person until of the age of eighteen years; and for the support of each parent, or grandparent, of the deceased, if dependent upon him at the time of the accident, fifteen per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband) or for the support of surviving child or children." The appellants' contention under this section is that no provision is made for a dependent parent unless the deceased left a surviving wife or children. The contention appears to us frivolous. The evident intent of the statute is to limit all of the compensation to sixty-six and two-thirds per cent of the wages of the deceased, and to give compensation to the surviving wife, children, parents or grandparents, who are dependent, only if such compensation can be brought within the maximum percentage allowed. Each parent or grandparent is allowed fifteen per cent of such wages during his dependency if the allowance to the widow and children do not equal sixty-six and two-thirds per cent of the wages. This condition exists where there is no widow or children, and the Commission was justified in awarding compensation to the parents, even though the deceased was unmarried at the time of his death.

It is further claimed that there can be no dependence within the meaning of the statute upon the wages of a minor. This contention is borne out by neither reason nor authority. The parent can be dependent upon the support of a minor child just as much as upon the support of an adult child. (See *Main Colliery Co. v. Davies*, 16 T. L. R. 460; *Hodgson v. Owners of the West Stanley Colliery*, 26 id. 333; also reported in 3 Butterworth's Compensation Cases, 260.)

The award should be confirmed, with costs. All concurred. Award affirmed. *Frisica v. Drake Bros. Co.*, 167 App. Div. 496, May 5, 1915.

*F. Dependency limitations.* — The term "dependency" has been in process of interpretation. In denying compensation to a mother in a certain case the State Industrial Commission, speaking through Commissioner Lyon, ruled:

LYON, Commissioner: This is a claim growing out of the death of James P. Williams and there is no disputing the fact that Williams' death was the

result of an accident arising out of and in the course of his employment. Williams was an unmarried man and the only person claiming to be a dependent is his mother, a lady about sixty years old. It appears from the testimony of the claimant herself, that at the time of her son's death she was possessed of property of the clear value of upwards of \$14,000, consisting of one piece of real estate of the value of \$7,000, mortgaged for \$1,000; one piece of the value of \$2,800, mortgaged for \$1,200; one piece of the value of \$3,700, mortgaged for \$1,250; one piece of the value of \$3,700, free and clear, and \$500 in the savings bank. The son was about twenty-one years of age and earned \$12 per week. The mother's testimony is that he gave her his wages as he earned them and received from her in return his board and lodging, clothing and spending money.

There was no attempt made to show what the value of the board and lodging was or what was used by the son for clothing or for spending money. I am not at all sure that looking at the expenses of running a house for the benefit of the mother and son in conjunction, the son's contribution of \$12 per week, or that part of it which was left after paying for his clothing and spending money, was anything more than his fair share of the expense. I am rather doubtful whether he contributed to the support of his mother in any just sense, but be that as it may, I am unable to see how a mother who is possessed of \$14,000 in her own right can be held under the statute to be in any sense dependent upon a son whose gross earnings were but \$12 per week. If the property of the mother brings in a revenue of 5 per cent it would give the mother an income greater than the whole earning power of the son, and if the \$14,000 were, by the mother, invested in an annuity for her own benefit for life in any of the strong life insurance companies, it would give her a very much increased income, and I cannot believe the intent of the statute was to compel an employer to contribute to the support of a mother in order that the mother on her decease, may leave considerable property to be distributed among other people and I advise that no award be made in this case other than for funeral expenses of the deceased.

The Commission acted upon the foregoing matter in accordance with the foregoing opinion. *Williams v. Coney Island Construction Co.*, S. D. R., vol. 6, p. 346, Nov. 24, 1915.

In *Kolb v. Borden's Condensed Milk Co.*, denial of compensation to a mother and her daughters on the ground of non-dependency upon their son and brother was affirmed by the Appellate Division without opinion: S. D. R., vol. 4, p. 347, April 6, 1915; 173 App. Div. 988, May 3, 1916.

On the other hand the Appellate Division has ruled that parents supported by the wages of minor children, dependents supported by the decedent employee voluntarily and dependents supported by the decedent employee only partially and indirectly may have compensation. The first point was determined in

*Frischia v. Drake Bros. Co.*, the text of which is given above on p. 309. The second and third were determined in the following case of a young unmarried man who voluntarily contributed part of his wages, over and above his own board, weekly to the general maintenance of his father's family and in so doing indirectly helped to support his sister, a school girl who earned nothing herself. The text of the decision is as follows:

LYON, J.: The principal question presented by this appeal is the rights of Henrietta L. Waltz, the sister of the deceased, to the award made in her favor by the Workmen's Compensation Commission.

Charles L. Waltz met an accidental death while engaged in a hazardous occupation as an employee of the appellant. He was twenty-three years of age and unmarried. He had always lived in his father's family, the other members of which at the time of his death were his father, mother, sister and a younger brother. The father was sixty years of age, a carpenter by trade, but so afflicted was rheumatism as to be able to do little work. His earnings, which were very small, he turned over to his wife to be used toward the maintenance of the family. The sister was a delicate school-girl, fifteen years of age. The brother was about nineteen years old and earning eight or nine dollars a week, out of which he paid four or five dollars to his mother for his board. The house was owned by the mother, who was the housekeeper and managed the financial affairs of the family. The value of the house was not given, but it was assessed for two thousand six hundred dollars and mortgaged for two thousand dollars. The weekly wage received by the deceased was twelve dollars and ninety-eight cents. Of this sum he voluntarily paid into the hands of his mother each week to assist in maintaining the family from eight to ten dollars, usually the latter sum. These contributions, together with the rental received from a married daughter who occupied four rooms on the second floor, the amount of which was not stated, seems to have constituted the family income. The amount was evidently meager to meet the necessities to which it had to be applied, as the mother stated that it had been no small matter for her to meet the interest on the mortgage. The girl earned nothing, and had no independent means of support. This fund seems to have been the only moneys out of which shelter, board and clothing were furnished her. That the contributions of the deceased were in excess of the cost of his maintenance in the family is apparent from the fact that the family was to a considerable extent dependent upon such contributions for their maintenance and support.

We think, in view of these facts, that the sister, as well as the father and mother, was a dependent of the deceased within the intent of the statute. The award made to the sister was one dollar and ninety-five cents per week until she shall arrive at the age of eighteen years. The awards to the father and mother were each also fifteen per cent of the weekly wage of the deceased, but were without limitation as to time. This was in accordance with the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 16, subd. 4, as amd. by Laws of 1914, chap. 316). That

the father and mother were dependents, we do not understand to be seriously questioned. The appellant contends, however, that the sister was not a dependent within the meaning of the statute, for the reasons that the moneys for her support were not paid directly to her individually by the deceased, and that her parents were legally chargeable with such support. If dependent upon the moneys contributed to her support by the deceased, such dependency was not affected by the fact that the moneys were so applied by a person to whom they had been paid by the deceased for that purpose. Nor does the statute limit the right to an award to those dependents who had the legal right to compel the deceased to furnish them support, but it applies as well to cases where the person was dependent for support upon the voluntary contributions of the deceased. There is no merit in appellant's contention that by reason of the parents being legally chargeable with the support of the daughter, the award to them must be deemed to include any benefit to which she might otherwise be entitled, and hence that an award to her was granting double compensation.

As well might it be claimed that making an award to the mother constituted double compensation, and that her right to death benefits was merged in his, by reason of the legal liability of the father for her support. Section 16, subdivision 4, of the Workmen's Compensation Law (as amended, *supra*) expressly provided for an award to each as follows: "4. \* \* \* For the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until of the age of eighteen years; and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the accident, fifteen per centum of such wages during such dependency. \* \* \*" The statute plainly intended that the award to each person should be for the support of such person. It is made exempt from all claims of creditors and from levy, execution, attachment or other remedy for the recovery and collection of a debt, and this exemption may not be waived. (Workmen's Compensation Law, § 33.) The sister was clearly dependent upon the deceased to the extent that his contributions were necessarily used for her support. The question of dependency is one of fact. The statute does not require that a person shall be wholly dependent in order to be entitled to the death benefit, and the fact that the sister was in part dependent for her support from sources other than the contributions of the deceased, will not deprive her of the benefit of the statute. Actual partial dependency of a person bearing one of the several relationships specified in the statute will suffice.

We think the action of the Commission in awarding compensation to the father, mother and sister of the deceased was right and should be affirmed. Award unanimously affirmed. *Walz v. Holbrook, Cabot & Rollins Corp.*,

170 App. Div. 6, Nov. 10, 1915.

Where the death of the employee is attributable to another not in the same employ and a surviving wife or dependent husband elects to bring an action for damages under Workmen's Compensation Law, § 29, a surviving parent, brother, sister, grandparent or grandchild, dependent under Workmen's Compensation

Law, § 16, subd. 4, is not thereby deprived of the right to claim and receive compensation: *Cahill v. Terry & Tench*, p. 122, above.

A determination of the State Industrial Commission that a claimant is dependent, if supported by any evidence, is final and non-reviewable by the courts: *Hendricks v. Seeman Bros.*, above, p. 190.

The Appellate Division reversed an award to a mother in Germany on the ground that the evidence of her dependency was solely hearsay and remanded the case to the Commission for further action. The court declared that even the hearsay testimony did not show whether money alleged to have been sent by the son to the mother was not simply a gift or a discharge of indebtedness. The case is illustrative of the difficulties attending awards to European dependents of immigrant workmen: *Tirre v. Bush Terminal Co.*, below, p. 376.

G. *Lump sum awards.*—As a regular practice, Workmen's Compensation Law, § 25, requires payment of compensation awards by instalments, like the periodic payment of wages. The section, however, permits the State Industrial Commission to commute awards and pay them in lump sums where "the same shall be in the interest of justice." The grounds upon which the Commission grants such commutation and the factors that enter into it have been set forth by the Secretary of the Commission in the Monthly Bulletin of the State Department of Labor for February, 1916, pp. 2 and 3. Workmen's Compensation Law, § 17, makes an exception to this discretionary power of the Commission. Under its provisions, the Commission must commute awards to alien dependents not residing in, nor about to depart from, the United States or Canada, when the insurance carriers so request. Furthermore, the payment to them is fixed at "one-half of the commuted amount of such future instalments." In the case of *D'Angelo Smith & Co. & Locher*, Files of the Commission, No. 60063, a laborer having been killed by an explosion of dynamite on December 5, 1914, a year passed before his father and mother, residents of Italy, were established to be his sole dependents. December 22, 1915, the Commission awarded them accrued compensation in the sum of \$237.93. The Department

of Labor paid this amount out of a deposit of the insurance carrier. The carrier made application for a lump sum award. The Department determined the present value of the award to be \$1971.31. A question arose as to whether the \$237.93 already paid should be added to the \$1971.31 as part of the lump sum. If it were, the parents, under the one-half provision, would be entitled to a balance of \$866.69; if it were not, to a balance of \$985.66. In the ensuing correspondence the Secretary of the Commission, under date of March 20, 1916; upheld the contention of the insurance carrier for the amount of \$866.66, saying: "If all dependents reside abroad the Commission has made commutation as from the beginning of an award; but, if resident aliens have received any part of the award before application is made for commutation, then such commutation includes only such part of the award unpaid, *i. e.*, future instalments."

H. *Non-coverage of dependents over eighteen.*—The Workmen's Compensation Law provides no death benefits for dependent children over eighteen, brothers or sisters over eighteen, adult kindred other than parents or grandparents, or non-relatives. Cases of dependency of such adults due to ill-health or crippled condition are not uncommon. From the omission of this class of dependents has come a most important and far-reaching decision of the Court of Appeals interpretative of the Constitution of New York. In *Shanahan v. Monarch Engineering Co.* an adult sister brought action under sections 1902-1908 of the Code of Civil Procedure for pecuniary loss through death of her brother. The Supreme Court, in Erie Special Term, construed sections 18 and 19 of the Constitution together and held that the language of section 19, and of Workmen's Compensation Law, § 11, making the employer's liability to pay compensation exclusive of all other liabilities meant simply possession of an exclusive liability and remedy by persons specified in the Workmen's Compensation Law and that the common law right of action, as established by section 18 of the Constitution, remained to persons not specified in the Workmen's Compensation Law. This trial term opinion is as follows:

WHOLEY, J.: The plaintiff alleges in her complaint, that her intestate, Michael Shanahan, was in the employ of the defendant as an iron worker,

and engaged on a scaffold at or near the top of a building in process of construction. That owing to the negligence of the defendant in failing to properly construct and guard said scaffold the plaintiff's intestate fell to the ground and was instantly killed.

The complaint alleges the intestate left him surviving, as his only heirs-at-law and next of kin, three sisters and one brother, and no widow, father or mother or descendants. The action is prosecuted for the benefit of the sisters and brother, as provided by section 1902 of the Code of Civil Procedure, for the pecuniary loss alleged to have been sustained by them through the death of their brother.

The answer interposed by the defendant denies negligence, and as a further defense sets forth the provisions of chapter 816 of the Laws of 1913, as reenacted by chapter 41 of the Laws of 1914, and amended by chapter 316 of the Laws of 1914, commonly known as the Workmen's Compensation Law. It alleges that the intestate, at the time of receiving the injuries resulting in his death, was engaged in work within and under the provisions of the Workmen's Compensation Law, and that by the terms of said act the defendant, upon securing the payment of the compensation therein provided, thereby became and was relieved of all liability for personal injuries or death sustained by its employees, and particularly for any liability because of the death of plaintiff's intestate, Michael Shanahan.

To this portion of the defendant's answer the plaintiff demurs on the ground that it is insufficient in law on the face thereof to constitute a valid and legal defense.

The question raised by the demurrer is whether, in view of the provisions of the Workmen's Compensation Law, the plaintiff can maintain this action. The act in question provides as follows:

"§ 16. Death Benefits.—If the injury causes death, the compensation shall be known as a 'death benefit,' and shall be payable in the amount and to or for the benefit of the persons following:

"1. Reasonable funeral expenses, not exceeding one hundred dollars."

The act then proceeds to specify the persons to whom the benefit shall be paid, to wit, to a surviving wife or dependent husband, and to surviving children, grand-children, parents and grandparents, according to the circumstances of the particular case.

The statute makes no provision for the payment of any benefit whatever to surviving brothers and sisters, but does declare, in section 11 of the act, that: "*The liability prescribed \* \* \* shall be exclusive,*" except where the employer fails to secure compensation to his employees in the manner prescribed by the act.\* It is contended, therefore, by the defendant, that having complied with the requirements of the act no liability exists to the plaintiff in this action.

On the other hand, the plaintiff insists that, inasmuch as the Compensation Law fails to provide any benefit for brothers and sisters, it should not be construed to take away a right of action for their benefit, and if it does undertake to exclude them from any right of action for their brother's death, to that extent the act is unconstitutional and void.

\* In making this statement the court doubtless meant adult brothers and sisters. The statute, § 16, subd. 4, provides benefits for dependent brothers and sisters who are under the age of eighteen years.



At common law there exists no cause of action for the negligent causing of the death of a person. Such a right of action, however, was created by chapter 450 of the Laws of 1847. By chapter 256 of the Laws of 1849, the amount recoverable was limited to \$5,000. By chapter 78 of the Laws of 1870, a provision was added that in such an action interest should be added to the verdict from the time of death. Such was the condition of the law when the Constitution of 1895 was adopted.

By that Constitution (article I, § 18), it was declared that: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

What was before a mere statutory right thus became a constitutional right. The statutory right as it existed at the time of the adoption of the clause of the Constitution quoted provided for a right of action for the benefit of brothers and sisters in certain contingencies — for the statute then in force provided the amount recovered in the name of the personal representative should "be for the exclusive benefit of the husband or widow or next of kin \* \* \* in the proportion now provided by law in relation to the distribution of personal property of persons dying intestate." Laws of 1870, chap. 78.

This statutory rule of distribution of the proceeds of a recovery in death cases remained practically unchanged until 1911, when section 1903 of the Code of Civil Procedure was amended, modifying the method of distribution by providing that "in case the decedent shall have left him surviving a wife or husband, but no children, the damages recovered shall be for the sole benefit of such wife or husband." Laws of 1911, chap. 122. So that, in such an event, brothers and sisters, by the amendment quoted, although next of kin, are prevented from sharing in the distribution, the entire amount in such case going to the wife or husband.

The statute law in reference to the right of recovery for death, and the mode of distribution of the recovery, remained practically unchanged from that time until, in 1913, section 19 was added to the Constitution by further amendment. This section provides as follows: "Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a State or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

In pursuance of the power and authority thus conferred, the legislature passed the Workmen's Compensation Law above referred to. Sections 10 and 11 of this act provide as follows:

"§ 10. Every employer subject to the provisions of this chapter shall pay or provide, as required by this chapter, compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury. \* \* \*

"§ 11. The liability prescribed by the last preceding section shall be exclusive, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury."

This act makes no provision for any death benefit to brothers or sisters in the event the deceased died leaving no husband or wife, descendants, parents or grandparents; and the defendant contends that in the absence of such a provision, and in view of the fact that the act declares that: "The liability prescribed by the last preceding section shall be exclusive" (§ 11), the plaintiff cannot recover in this action.

On the other hand, the plaintiff contends that if the Compensation Law is to be deemed in terms exclusive of any and all other remedies than such as are given for the parties named in the schedules, it undertakes to illegally deprive the plaintiff of a constitutional right.

A sister or brother may be wholly dependent on deceased for support, and suffer serious pecuniary loss by his death, and yet the Compensation Law would leave his sisters and brothers without remedy if the defendant's contention is to prevail.

Where such is the effect of the statute, when death comes to an employee leaving only brothers and sisters him surviving, and the employer is relieved from liability to contribute to any one whatever, in such a case can it be fairly said it does not violate section 18 of the Constitution declaring, "the right of action now existing to recover damages for injuries resulting in death shall never be abrogated." If it can be done, then the legislature could go a step further, and by amendment to section 1903 of the Code of Civil Procedure provide that the recovery in death cases should go to a wife and husband alone, to the exclusion of all other persons. It seems to the court that such an amendment would be violative of the letter and purpose of section 18 of the Constitution, unless section 19 which follows authorizes such an exclusion in a general compensation scheme. Section 19 of the Constitution gives to the legislature power to provide, by a workmen's compensation law, that "the right of such compensation and the remedy therefor shall be exclusive of all other rights and remedies to employees or for death resulting from such injuries."

Does this clause mean anything more than that where the legislature, by such a law, provides for compensation to those named in the act, such compensation and remedy shall be exclusive as to them, and as to them alone?

It would seem that section 19 of the Constitution is capable of such a construction, and should be given it, where it becomes necessary to do so in order to preserve substantial rights theretofore existing in favor of next of kin. This we understand to be the purpose and mandate of section 18 of the Constitution, which is to be read and construed in connection with section 19, authorizing the passage of a workmen's compensation law. At least, the purpose and intent to cut off and foreclose any such right to participate should clearly appear before a clause, either in the Constitution or in a statute, should be given such a construction.

When we come to the consideration of the law itself, we find that the statute reads:

"§ 10. Every employer subject to the provisions of this chapter shall pay or provide, as required by this chapter, compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment without regard to fault as a cause of such injury. \* \* \*

"§ 11. The liability prescribed by the last preceding section shall be exclusive, except that if an employer fail to secure the payment of compensation for his injured employee and their dependents, as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury."

The compensation mentioned in these sections is the compensation secured and to be paid to the individuals specified in the schedules of the act, and when in section 11 the act declares: "The liability prescribed by the last preceding section shall be exclusive," was it intended to deny to others all rights of action; or simply to declare that the amount required to be paid, and the method by which payment is secured, shall be the exclusive liability and remedy those specified shall possess? While the question is not free from doubt, we are inclined to the latter view of the case. In this we are sustained, partially, at least, by the very recent decision of the Appellate Division of the first department, in *Shinnick v. Clover Farms Co.*, 169 App. Div. 236.

In that case, the plaintiff's ear was partially bitten off by a vicious horse. He sued his employer alleging a common law liability on the ground of negligence. The defendant demurred, relying on the provisions of the Workmen's Compensation Law as a bar to the action. The schedule of injuries in that act for which compensation is to be made by the employer did not specify or include any compensation for injury to the ear. The court, however, held that in such a case the common law right of action still remained, notwithstanding the language of the statute saying the liability created by the statute should be exclusive.

We are of the opinion, therefore, for the reasons stated, the demurrer should be sustained, with costs of the demurrer to the plaintiff. Demurrer sustained, with costs. *Shanahan v. Monarch Engineering Co.*, 92 Misc. 466, December, 1915.

Four months later the Appellate Division, Fourth Department, affirmed the judgment and order of the Special Term. The court

held that in enacting section 19 of the Constitution the Legislature and the People of New York did not intend to take away the right of action in death cases to recover damages, as secured in section 18 of the Constitution, without providing a substitute therefor. The court said:

KRUSE, P. J.: The question presented by the plaintiff's demurrer to the defendant's second separate answer is whether the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1914, chap. 316) prevents a recovery for the pecuniary loss sustained by the surviving sisters and brother of the plaintiff's intestate as is provided by section 1902 *et seq.* of the Code of Civil Procedure.

The learned justice at Special Term held that it does not, and sustained the demurrer. (2 Misc. Rep. 466.) We have reached the same conclusion.

We are of the opinion that the right of action to recover damages for the death of a person, as it existed at the time of the adoption of section 18 of article 1 of the Constitution (which declared that such right should never be abrogated), is not affected by section 19 of that article, adopted November, 1913, amending the Constitution so as to permit the enactment of the Workmen's Compensation Law, save as that law makes provision for compensation to a person who otherwise would be entitled to a recovery in an action like this, and that the rights of the sisters and brother in this case are not affected by the provision contained in section 11 of the Workmen's Compensation Law (as amd. *supra*), which makes the liability prescribed by section 10 of that act exclusive. I think it was not intended by the amendment to the Constitution or by the Workmen's Compensation Law passed thereunder, to take away the right of action in death cases to recover damages, without providing a substitute therefor.

The intestate left him surviving no widow, no father or mother and no descendants. His only next of kin surviving him are the sisters and brother named in the complaint, and it is their loss, resulting from the death of their brother, occasioned through the fault of the defendant, his employer, for which the action is brought.

While provision is made by the Workmen's Compensation Law for compensation under certain contingencies to dependent brothers and sisters under the age of eighteen years (§ 16, subd. 4, as amd. *supra*), it does not appear that the sisters and brother for whose benefit this action is brought are under that age. Indeed, it was conceded upon the argument that they were not. So that, unless this action may be maintained, no right to recover damages for the negligent killing of the intestate exists at all.

I think the right of the persons for whose benefit this action is brought is not affected by the Workmen's Compensation Law, but remains as though that act had not been passed. This view, I think, is in accord with the reasoning of Mr. Justice SCOTT in *Shinnick v. Clover Farms Company* (169 App. Div. 236), where the determination of the Appellate Term is unanimously affirmed.

The interlocutory judgment and order appealed from should be affirmed, with costs. All concurred, except DE ANGELIS, J., who dissented.

Interlocutory judgment affirmed, with costs, with leave to the defendant to plead over within twenty days upon payment of the costs of the demurrer and of this appeal. *Shanahan v. Monarch Engineering Co.*, 172 App. Div. 221, April 19, 1916.

Following upon these decisions the Legislature in May, 1916, modified Workmen's Compensation Law, § 11, by inserting therein the words "and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death." The Shanahan case having been carried to the Court of Appeals, a decision was handed down, December 28, 1916, reversing the decisions of the two lower courts. The Court of Appeals holds that the Workmen's Compensation Law "covers the entire field of remedy for death cases" and that the remedy for unnecessary restriction of the classes benefited in death cases is amendment of the Workmen's Compensation Law by the Legislature. Relative to employers complying with the compensation law, section 19 of the Constitution impliedly repeals section 18. The court points out that section 19 also overrides the constitutional provisions against taking property without due process of law. In so holding, the court is not unanimous. The majority opinion and the brief minority opinion are as follows:

POUND, J.: A demurrer to one of the defenses in this action as insufficient has been sustained. The pleadings upon which this decision has been based disclose the following facts:

This action is brought under the provisions of sections 1902-1908 of the Code of Civil Procedure to recover damages for the benefit of the next of kin of Shanahan, claimed to have been caused by his death while in the employ of the defendant, resulting from the negligence of the latter. Shanahan at the time of his death was engaged in a class of work to which the Workmen's Compensation Law applied and would have provided compensation for a widow or certain designated next of kin if he had left them, and the defendant as employer had complied with the requirements of the statute. Shanahan, however, left no widow or next of kin meeting the description of those entitled to compensation under the act, his next of kin in whose behalf this action is brought being adult brothers and sisters who are not entitled to compensation under the act. The answer which has been held insufficient set up the Compensation Law as a bar to this action, and thereby the question has been presented which we are called on to determine—whether the Workmen's Compensation Law in the classes of employment therein enumerated, when an employer complies with its requirements, provides a right of compensation for death and a remedy therefor which are exclusive of all

other rights or remedies, even though it happens in a particular case that the decedent has left no widow or next of kin who are entitled to benefits under the act, but has left next of kin not entitled to such benefits.

The statutory provisions which for many years before the enactment of the Workmen's Compensation Law permitted the present form of action to be maintained against an employer to recover damages on behalf of the next of kin of an employee who had met his death as the result of his employer's negligence, were deemed so important that the right of action was in 1894 protected by a constitutional provision. Section 18 of article I of the State Constitution provided: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." At the time this amendment was adopted our statutes defined next of kin in whose behalf such action might be maintained and included adult brothers and sisters. (Code Civ. Pro. § 1903.)

In defense of the present Compensation Law against any charge of unconstitutional interference with the rights thus secured, it is urged that while this constitutional provision prohibited the abrogation of a "cause of action" arising from the negligent killing of an employee, the legislature was not thereby inhibited from changing the classes of persons in whose behalf as next of kin such cause of action might be enforced, and that, therefore, the Compensation Law may be regarded as merely changing the definition of next of kin who are entitled to relief in case of death by dropping therefrom adult brothers and sisters. Amendments in respect of the persons who should be entitled to damages which might be collected under the statute which have thus far been unchallenged in the courts are referred to as sustaining this view, and they do perhaps furnish support for it. Thus Laws of 1913, chapter 756, provides that the term "next of kin" shall mean both the father and the mother in certain cases, and Laws of 1911, chapter 122, excluded the next of kin, *e. g.*, the father, in favor of the wife or husband in certain cases. In the view which I take of the later constitutional amendment and of the provisions of the Compensation Law adopted in pursuance thereof, it will not be necessary to decide this proposition.

In 1910 the first Workmen's Compensation Law was passed (L. 1910, ch. 674). It was held to be unconstitutional because it imposed liability without fault and thus took property without due process of law. (*Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271.) Thereafter in 1913 the amendment to the Constitution was made (art. 1, section 19), which gave to the legislature plenary power to enact workmen's compensation laws. So far as material it reads as follows: "*Nothing contained in this Constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, \* \* \* or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum;*

provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer." Thereafter the present Workmen's Compensation Law was passed (L. 1914, ch. 41).

At the times involved in this action section 10 of the law read in part: "Liability for compensation. Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty."

Section 11 provided: "Alternative remedy. *The liability prescribed by the last preceding section shall be exclusive*, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury. \* \* \*"

Section 16, under the title "Death benefits," provided that in cases where the injury caused death, the compensation should be known as a death benefit and should be payable, first in satisfaction of reasonable funeral expenses not exceeding one hundred dollars and thereafter in the amounts and to the persons therein named, including, under the conditions and with the rights of priority fixed by the section, a surviving wife, or a dependent husband and children under the age of eighteen years, until they shall reach the age of eighteen years; dependent parents and grandparents.

Subdivision 4 specially provided that "If the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until of the age of eighteen years; and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the accident, fifteen per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband) or for the support of surviving child or children."

The constitutional amendment added in 1913 overrides all else in the State Constitution. "Nothing contained in this Constitution shall be construed to limit the power of the legislature to enact" (employees' compensation laws) is the comprehensive language used and this excludes the limitations of section 18 of article 1 relative to damages for injuries causing death as well as the limitations of section 6 of article 1 relative to taking property

without due process of law. It permits the legislature to fix the right to compensation to be paid by an employer for death resulting to an employee from injuries received in the course of his employment and to provide that "the right of such compensation, and the remedy therefor *shall be exclusive of all other rights and remedies* \* \* \* for death." It authorizes the legislature to adopt an employee's compensation system and to define who should be entitled to relief for damages without any state constitutional limitation whatever.

The statute which was adopted in pursuance of this constitutional amendment clearly provides that the liability provided *shall be exclusive* of all other rights and remedies except as in section 11, *supra*.

We have the provision that "Every employer subject to the provisions of this chapter shall pay or provide \* \* \* compensation according to the schedules of this article for the disability or death of his employees \* \* \*." (Section 10.) The schedules so referred to said: "If the injury causes death, the compensation shall be known as a death benefit and shall be payable" (Section 16) in the amount and to the persons fixed. Thus we have the fundamental provision of liability for the payment of a certain amount in a case of death which is to be the compensation therefor and to be distributed amongst the persons designated. A certain liability is imposed for death, and that liability exclusive. No other responsibility is left which springs from the occurrence upon which liability rests—death—and the effect of the compensation as a satisfaction of all other claims is in no way limited or impaired by the circumstances of the identity of the persons to whom it is paid or because in a given case no one survives to take advantage of the statute. The exception to the rule of compensation as an exclusive remedy emphasizes the meaning and force of the rule. If an employer fails to secure the payment of the compensation to his employees and their dependents as required by the statute, "an injured employee, or his legal representatives in case death results \* \* \* may \* \* \* maintain an action in the courts for damages." That is, if the employer fails to comply with the statute, he is subjected to such an action as the present one as a penalty.

This legislation may or may not be condemned as ill-considered or unjust in its bearing upon the present next of kin. Brothers and sisters as a class and as proper next of kin to be considered under the Compensation Law were not overlooked. They are provided for under certain conditions in case they are under eighteen years of age and dependents. (Section 16.) The same condition in respect to age is observed in the case of children, those under the age of eighteen years being entitled to the benefits of the act, those over that age not being entitled thereto. And again, if it be said that the law is defective in not going farther and insuring that in a given case the liability of the employer shall not be allowed to lapse because none of the designated beneficiaries survive, although there are living next of kin, the answer may be made in behalf of the legislature that in the exercise of legislative judgment it extended the benefit of the act as far as seemed necessary to accomplish its purpose of providing compensation for those who had a right to rely upon the support of the deceased employee.

The conclusions which we draw from an examination of the language of the constitutional amendment and of the statute become irresistible when we consider the conditions and purposes which led to their adoption and



enactment. While the right to maintain negligence actions to recover damages for the injury and death of employees was regarded of great importance and in death cases protected by the Constitution this method of remedy had generally become economically unsatisfactory. It resulted, it was widely believed, in injustice both to the employer who was sometimes the victim of unjust or excessive claims and to the employee who had to bear the necessary risks of the business and who was often delayed in the enforcement of a just claim and burdened with the expenses of a protracted litigation. The danger was ever present that an employee or his family might become dependent upon public support because no relief could be given for injuries to employees or for death resulting from such injuries. This old and unsatisfactory system of negligence law was the evil to which the legislature addressed itself when it enacted the Compensation Act of 1910, which was declared invalid because of constitutional objections. (*Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271.) The amendment to the Constitution was then adopted in 1913 in order to solve the question of legislative authority contrary to the decision of this court in the *Ives* case. In accordance with such amendment the present Workmen's Compensation Law was adopted. It has been held to be constitutional and this court has repeatedly said it should be liberally construed in order to carry out the intent and purpose for which it was enacted. (*Matter of Jensen v. Southern Pac. Co.*, 215 N. Y. 514.)

Under this legislation both classes, employer and employee, gained benefits and made concessions. The liability of the employer is no longer bounded and limited by the rules of negligence but is imposed upon him when he is without fault as well as when he is guilty of negligence. The employee and his dependents receive compensation which may be smaller than would have been the amount of a judgment in a negligence action, but on the other hand they are compensated for injuries resulting from risks heretofore assumed by them, the relief is summary, the practice simple, and they are not hampered or defeated by rules of negligence law or by technical defenses and procedure. It is not to be assumed that the legislature intended to provide rights and remedies for some of the dependent relatives and to leave the old form of remedy in force as to the others. A new system was substituted in its entirety for an outgrown and objectionable one.

If it were necessary to reinforce this course of reasoning by a statement of some of the incongruities which would follow if the other view urged upon us should be adopted, the very relation of brother and sister which is here involved presents an illustration. In a death case where the decedent has left no wife or nearer relatives than brothers and sisters, the statute provides for the payment of benefits to the latter if they are under eighteen and dependent. If the decedent left one brother under and another one over eighteen years of age, under the theory which has been adopted by the courts below the Compensation Law would be binding upon the former and exclusive of any other remedy, whereas the latter would be entitled to bring an action to recover damages. The same condition would arise in the case of children under and over eighteen years of age. These illustrations furnish a practical argument in favor of the view that the new legislation covers the entire field of remedy for death cases.

In *King v. Viscoloid Co.* (219 Mass. 420) the court said that it was the

intention of the legislature to take away from employees who should become subject to its provisions all other remedies that they had against their employers for injuries happening in the course of their employment and arising therefrom, but held that the other and different common-law right of action existing in favor of a parent to recover damages for loss of services occasioned by an injury to a minor son was not affected by the provisions of the Compensation Act, concluding, however, that if the legislature had chosen not to leave the parent's right of action unaffected it might have taken it away altogether. In New York the right of next of kin not covered by the act is taken away altogether.

The cases of *Gregutis v. Waclark Wire Works* (86 N. J. Law, 610) and *Pett v. Mills* (76 Wash. 437) support the views which we have adopted in this case.

In the New Jersey case it was held that where a deceased employee by his agreement either express or implied had accepted and become bound by the provisions of the Workmen's Compensation Act such agreement would be a surrender of the right to any other method, form or amount of compensation and would in the terms of the act "bind the employee himself and for compensation for his death would (shall bind his personal representatives, his widow and next of kin," and that the personal representatives of the employee could not maintain an action under the death act for damages for his death even though the only dependents deceased left him surviving were aliens and not residents of the United States who were not entitled to compensation under the act. We do not regard the applicability of that decision as dependent upon the fact that the employee did or did not sign an agreement, for we think that the provisions of our Compensation Law applied to and entered into the contract of employment of the present decedent, certainly in the absence of something indicating the contrary. (*Matter of Post v. Burger & Gohlke*, 216 N. Y. 544.)

In the Washington case it was held that all rights of civil action for workmen's injuries, *even against third persons*, were abolished by their compensation act.

The New York act of 1914 takes away from the workman his old right of action where the accident is due to the fault of the employer and denies compensation to certain classes of next of kin in death cases. Under the English act, in cases where the workman would previously have had a right of action, he has the option of resorting thereto or to proceedings under the act. (*Cribb v. Kynoch, Limited*, [1908] 2 K. B. 551.) Here again is presented a question of legislative policy with which the courts have not to do.

"Any plan devised by the wit of man may in exceptional cases work unjustly, but the act is to be judged by its general plan and scope and the general good to be promoted by it." (MILLER, J., in *Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514, 528.)

The Constitution permits the legislature to provide a remedy exclusive of all other rights or remedies for death of employees resulting from injuries; the legislature has provided the exclusive remedy. If the classes of persons benefited are unnecessarily restricted in death cases the remedy is not by a strained interpretation of the Constitution by the courts but by a mere amendment to the Compensation Law by the legislature.

We think the order appealed from should be reversed, with costs in all courts, and that the question certified to us should be answered in the negative.

WILLARD BARTLETT, Ch. J. (dissenting). I dissent from the proposed reversal in this case. I think that all persons who were entitled to maintain an action for negligently or wrongfully causing death before the amendment to the Constitution authorizing the enactment of the Workmen's Compensation Law are still entitled to maintain such an action except those for whom a remedy is provided by the Workmen's Compensation Law itself. I agree with the learned Appellate Division that it was not intended by the amendment to the Constitution or by the Workmen's Compensation Law passed thereunder to take away the right of action in death cases to recover damages without providing a substitute therefor.

HISCOCK, CUDDEBACK, HOGAN and CARDOZO, JJ., concur with POUND, J.; WILLARD BARTLETT, Ch. J., reads dissenting memorandum, with whom CHASE, J., concurs.

Order reversed. *Shanahan v. Monarch Engineering Co.*, 219 N. Y. 469, December 28, 1916.

I. *Compensation not a vested interest.*—An employee having been granted compensation for a fixed period of weeks, died of other cause than his accidental injury before the period had run out. The Appellate Division, upon question certified, held that the unpaid weekly installments did not survive to his estate: *Wozneak v. Buffalo Gas Co.*, — App. Div. —, November 15, 1916.

J. *Deposit of advance compensation by self-insurers.*—The State Industrial Commission made a ruling to require self-insurers to pay into the State Fund the value of future installments on awards made against them. This ruling has been held invalid relative to the compensation of widows: *Adams v. New York, Ontario & Western Ry. Co.*, — App. Div. —, November 29, 1916; — N. Y. —, January 30, 1917.

## WAGES AS THE BASIS OF COMPENSATION

(Workmen's Compensation Law, § 3, subd. 9, §§ 14-16, 101, 102, 113)

A. *Loss of hand, foot, arm, leg or eye.*—Subdivision 9 of section 3 of the Workmen's Compensation Law defines wages; section 14 makes the average weekly wage of injured employees the basis of compensation and death benefits, except where the Workmen's Compensation Law declares otherwise, and provides methods of computing the average weekly wages; sections 101, 102, 113, require employers to keep, and to give access to, records of wages. Subdivision 5 of section 15 establishes maximum and minimum limits for the use of the average weekly wages as the basis of disability compensation under section 15 and, also, according to the following interpretation by the Commission, absolutely excludes use of the average weekly wages as the basis of compensation for loss of a hand, arm, foot, leg or eye. For loss of these members, the wages at the time of the injury, and not the average weekly wages, are the basis. The ruling is as follows:

BY THE COMMISSION: Claim for compensation is presented in this case for the loss of an eye resulting from an injury received July 11, 1914. The claimant was employed by Joseph H. Worden, in the manufacture of bushel crates and berry crates. While driving a nail into a berry crate the nail flew, striking the claimant in the left eye resulting in injuries which made the removal of the eye necessary. Claimant had been engaged in the employment for thirty days prior to the accident. During the year 1910 he had worked about sixty days in the same employment and except upon these two occasions he was engaged at farming and gardening upon a small piece of land upon which he resided.

The evidence in the case established that the industry of manufacturing bushel and berry crates is carried on only about one-fourth of the year. The work starts in February, March or April and lasts until about July first. During the past five years the employers had carried on this business a total of 451 days, or an average ninety and one-fifth days each year. Other manufacturers carried on the same work for about the same period of time. At the time of the injury the claimant was receiving wages at the rate of one dollar and twenty cents per day.

It is contended on the part of the employer that the average annual earnings of the claimant, or his average annual earning capacity, as determined by section 14 of the Compensation Law, would be limited to the amount which the claimant might earn during the period the employment was

carried on. This would be ninety and one-fifth days at the rate of \$1.20 per day, amounting to the sum of \$108.24. It is also claimed that the average weekly wages must be determined under subdivision 4 of section 14 by dividing the annual earnings, \$108.24, by fifty-two, which would make the average weekly wage of \$2.08 $\frac{1}{2}$  per week. If this method were adopted claimant would be entitled to compensation for a period of 128 weeks at the rate of \$2.08 $\frac{1}{2}$  per week, making the total compensation \$265.44.

An examination of the statute as a whole makes it clear that this method of computation is improper and that claimant is entitled to compensation for a period of 128 weeks at the minimum rate of five dollars per week. Section 14 provides:

*"Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits, and shall be determined as follows:"*

Three methods are then prescribed for ascertaining the average annual earnings of the employee, and subdivision 4 provides: "The average weekly wages of an employee shall be one-fifty-second part of his average annual earnings;"

It will be seen that the average weekly wages as determined by section 14 does not apply if the basis of compensation is otherwise provided in the compensation law. Under the schedule established by subdivision 3 of section 15, the compensation in case of disability, partial in character but permanent in quality, including the loss of an eye, is fixed at sixty-six and two-thirds per cent of the average weekly wages for the periods therein enumerated, which, in the case of the loss of an eye is 128 weeks. Subdivision 5 of this section relates to maximum and minimum rates and reads as follows:

*"5. Limitation. The compensation payment under subdivision three in case of the loss of a hand, arm, foot, leg or eye, shall not exceed twenty dollars per week nor be less than five dollars a week; provided, however, that if the employee's wages at the time of the injury are less than five dollars per week he shall receive his full weekly wages."*

Under the limitation contained in this subdivision the minimum compensation for the loss of an eye is fixed in the sum of five dollars per week, except that if the employee's wages at the time of the injury are less than five dollars per week he shall receive full weekly wages. The employer in this case contends that "*the employee's wages at the time of the injury*" are less than five dollars per week. This conclusion is reached by applying the process established by the section 14 for determining "*the average weekly wages*."

Wages are defined by subdivision 9 of section 3 as follows: "Wages means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, lodging or similar advantage received from the employer."

Under this definition it is clear that the employee's wages at the time of the injury in the case under discussion were the sum of seven dollars and twenty cents per week, and are therefore not less than five dollars per week. In this connection it is significant that the term "average weekly wages" is used in section 15 except in the proviso contained in subdivision 5.

This shows a clear intention on the part of the Legislature that the term "wages" means actual wages as defined by subdivision 9 of section 3 instead of average wages as determined by section 14.

We hold, therefore, that the claimant is entitled to the minimum compensation of five dollars per week.

In this case claimant did not request his employer to furnish medical treatment until sixty days had elapsed after the injury. The employer upon two occasions, however, had notice that medical care and treatment were required. We believe the employer is liable for such medical treatment and services as may be required. The amount expended for medical services and treatment is the sum of eighty dollars and fifty cents, which appears very reasonable and such sum is awarded to claimant in addition to compensation for the loss of the eye. All concur. *Morey v. Worden*, S. D. R. vol. 2, p. 494, Jan. 28, 1915.

*B. Minor's expected wage increase.*—Another modification of the use of the average weekly wages as the basis of compensation permits the Commission to allow for expected increase of wages of injured minor employees (Workmen's Compensation Law, § 14, subd. 5). The Commission awarded death benefits to a dependent mother and sister on a basis of five dollars and fifty cents, the average weekly wages of their sixteen-year-old son and brother who had been killed by the explosion of a gas stove in his employer's plant. After investigation and report the Commission raised the basis of the award from five dollars and fifty cents to ten dollars. The Appellate Division unanimously approved this increase in the following opinion:

HOWARD, J.: The deceased in this case was a boy sixteen years old. At the time of his death he was earning \$5.50 a week. It appears from the evidence, and the Commission has found, that "As he progressed in his trade, his wages at the end of two years would, under normal conditions, have increased to \$12 per week, and upon arriving at his majority he would have earned in his trade from \$12 to \$18 per week." An award has been made to a dependent mother and sister.

The appellants do not dispute the facts but contend against the consideration by the Commission of a probable increase in the wages of the deceased minor employee and against an award based on such consideration. The Commission has assumed that its power to make the award appealed from arises from the language of section 14 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). The relevant parts of the section read as follows: "§ 14. Weekly wages basis of compensation. Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits, and shall be determined as follows: \* \* \* If it be established that the injured employee was a minor when injured, and that under normal conditions his wages would be

expected to increase, the fact may be considered in arriving at his average weekly wages." Arriving at his average weekly wages for what purpose? For the purpose of computing "compensation or death benefits." This answer comes out of the 1st paragraph of section 14 itself. This is not the case of widely separated and apparently discordant sections of a statute which the court is to attempt to harmonize. Here the language under consideration is all in one section and treats of one subject. Stripped of matters not germane to the subject in hand, we find that section 14 provides that the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits, and if the injured employee was a minor when injured and under normal conditions his wages would be expected to increase, that fact may be considered in arriving at his average weekly wages. Therefore, it follows that the Commission acted in accordance with the exact letter as well as the spirit of the law.

The attempt of the appellants to invoke the last sentence of section 16 of the act (as amd. by Laws of 1914, chap. 316) in support of their contention fails entirely as we comprehend the statute. The sentence in question is as follows: "All questions of dependency shall be determined as of the time of the accident." This is simply a command to the Commission whenever it attempts to ascertain who are dependents of a deceased employee to take into consideration the circumstances at the time of the accident. It relates in no manner to the right of the Commission to consider the probable earning capacity of an injured employee who was a minor when hurt. The award should be affirmed, with costs. Award unanimously affirmed; COCHRANE, J., not sitting. *Kilberg v. Vitch*, 171 App. Div. 89, January 5, 1916.

Other instances of raise of the wage basis of compensation on account of the minority of the claimants are: *Itzikowitz v. Lakner*, S. D. R., vol. 5, p. 398, a youth of twenty losing part of his index finger between a press and a die while learning the leather goods trade, increase from \$5.11 to \$9.61; *Carkey v. Island Paper Co.*, S. D. R., vol. 6, p. 321, a youth of eighteen totally disabled for life by loss of both hands in a paper machine, increase from \$9.23 to \$14.42; and *Peck v. Onondaga Paper Co.*, S. D. R., vol. 7, p. 445, a youth of seventeen losing the ends of the fingers of a hand in a paper machine, increase from \$9.60 to \$12.\*

C. *Determination of average weekly wages.*—The case of *Fredenburg v. Empire United Railways*, 168 App. Div. 618, interprets the methods of determining the average weekly wages of injured employees prescribed in Workmen's Compensation Law,

\* The award in the Peck case has been reversed by the Appellate Division upon authority of the decisions of the Court of Appeals in *Grummet v. Zinn* and *Kanar v. Acorn Mfg. Co.*, above, pp. 284-286; the Carkey case is awaiting decision upon appeal, January, 1917.

§ 14. Fredenburg had been working for some years as a passenger car motorman at thirty cents per hour. One month and two days, Sundays excepted, before he received his injuries he had become an express car motorman at thirty-five cents an hour. The Commission awarded him compensation upon the thirty-five, rather than the thirty cents basis. Approving this action, the Appellate Division said:

As to the computation of claimant's wages, section 14 of the Workmen's Compensation Law (Consol. Laws, chap. 67 Laws of 1914, chap. 41) provided that, except as otherwise provided in that chapter, the average weekly wages of the injured employee at the time of the injury should be taken as the basis upon which to compute compensation or death benefits, and should be determined as follows: If the injured employee shall have worked in the employment in which he was working at the time of the accident during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times his average daily wage. If he shall not have so worked, his average annual earnings shall consist of three hundred times the average daily wage which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place, shall have earned when so employed. If either of the foregoing methods of arriving at the annual average earnings cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee, and of other employees of the same or most similar class, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident.

The employment of the claimant as motorman on the express car was assured for at least six months from the time he entered upon it, and there was a reasonable possibility of his continuing on that run. Although he had not worked as motorman on the express car for the year immediately preceding the accident, it appears from the affidavit of the secretary of the defendant that it was the custom of the defendant to pay an employee who had been in the service of the company as long as the claimant, thirty-five cents per hour upon a freight run. This tended to fix the average daily wage of a motorman in such employment prior to the time the claimant took that run, as well as to fix the average earnings of other employees in the same position. We think the finding of the Commission as to the average weekly wages of the claimant was fully warranted by the evidence. *Fredenburg v. Empire United Railways*, 168 App. Div. 621, July 1, 1915.\*

A determination of average weekly wages is a question of fact which the courts, under the inhibition of Workmen's Compensation

\* Part of this case pertains to the entirely separate subject of concurring awards and is given under that head at p. 277.



tion Law, § 20, will not review, if such determination is supported by any evidence: *Fairchild v. P. R. R. Co.*, 170 App. Div. 135; *Fredenburg v. Empire U. Railways*, 168 App. Div. 618; *Rhyner v. Hueber Building Co.*, 171 App. Div. 56.\* The latitude given to the Commission for determining the average weekly wages is indicated by the words of the court in the Rhyner decision: "The appellants contend that the method of computing the deceased's wages was incorrect. We think the conclusion reached by the Commission was correctly worked out. Of course we are unable to say what mental processes the Commission employed in arriving at the figures given in their decision, but it seems to us that, under the evidence, the figures given might, very properly, have been the result of the method of computation pointed out in subdivision 3 of section 14." The Commission, in *Fagan v. United Traction Co.*, Claim No. 36456, February 23, 1916, applied the wage rate of a regular employee in the same work to determine the wage rate of an occasional or extra employee. In *Prentiss v. N. Y. State Rys.*, Claim No. 29483, November 15, 1915, the average annual earnings of an employee working seven days a week were computed with a multiplier of three hundred and thirty-two, instead of three hundred, the multiplier prescribed by Workmen's Compensation Law, § 14, subd. 1. An appeal was taken from the ruling. In *Burke v. Industrial Engineering Co.*, Claim No. 30288, February 8, 1915, award was made on a wage basis of \$2 per day. The claimant, Burke, complained that he had been accepting \$2 per day for but four weeks as a result of slack times and that he had been earning \$4.50 a day for nineteen years with the Industrial Engineering Company, for which he had worked twenty-three years altogether. A brief discharge and a re-employment appear to have figured in the case. The Commission, having reviewed its award, adhered to the basis of \$2. In *Dearborn v. Peugeot Auto Import Co.*, given above, p. 233, the Appellate Division remanded the case to the Commission for further facts relative to the employment. Accordingly, the Commission ascertained that Dearborn, who lost his life as a racer on an automobile speed track, had an agreement for one-half of the money that he might

\* For the first of these cases see p. 179; for the second, p. 332; for the third, p. 375.

win in any race and a drawing account of \$25 per week. It renewed the award that it had originally made on the basis of the drawing account: S. D. R., vol. 7, p. 413, February 3, 1916. This renewed award was unanimously affirmed by the Appellate Division, November 15, 1916. In *Noonan v. Yellow Taxicab Service*, Claim No. 14485, March 3, 1916, the Commission excluded tips in computing the average weekly wages; but in *Sloat v. Rochester Taxicab Co.*, S. D. R., vol. 8, p. 498, May 12, 1916, included them. The Sloat case is awaiting decision upon appeal, January, 1917.

The Commission's attitude and methods in computing wages have been set forth in Chairman Mitchell's address to the Associated Manufacturers and Merchants published in the monthly Bulletin of the Department of Labor, June, 1916, pp. 17-19.

## RELEASE FROM LIABILITY

(Workmen's Compensation Law, §§ 29, 33.)

Release by an administrator from liability for negligence cannot affect the rights of persons entitled to compensation. A freight conductor killed in the course of his employment left six children, three adults and three minors. The railroad company, relying upon the fact that it was engaged in interstate commerce, secured a full release from his administrators upon a payment of \$800. Commissioner Lyon, in declaring such release invalid as against the minors, drew the following distinctions, which were approved by the Commission:

In my opinion the release executed by the administrators of the deceased's estate can have no effect (*sic*) as against these claimants. In any event the claim which was settled by the payment of \$800 and the taking of a release was entirely different from that which is presented here. It was a claim for damages and not a claim for compensation. The money was paid to and the release was received from different persons entirely from those now making the claim. The ultimate destination of the money received by the administrators might go in an entirely different direction from that in which the compensation if granted, will go. The money paid the administrators if not liable for decedent's debts, may, for aught that appears, be divided equally between the children of William H. Buell of whom there are six, whereas, the compensation is not liable for debts (Compensation Law, § 33) and is to go to the minor children under eighteen years of age only, of whom there are but three. This distinction in the destination of the money and in the proper persons who should bring the proceeding, was noted by the Court of Appeals in the Winfield case already referred to.

The payment of \$800 already made cannot be offset against the compensation to be awarded. The money has not been paid in such wise that it will reach in its entirety the claimants under the compensation law, and, it was not paid as compensation in pursuance of section 21-a\* of that law. I advise that compensation be awarded. Should it be made to appear that any part of the \$800 actually reached the claimants here, it may, on application of the employer, be offset against their award. *Buell v. N. Y. Central and H. R. R. Co., S. D. R.*, vol. 6, pp. 361, 377, December 14, 16, 1915.

According to a decision of the Appellate Division in March, 1916, a release of a third party from liability, executed by the

\* There is no § 21-a; the intended reference is probably § 20-a.

injured employee himself, does not debar the employee from compensation. Nor does such release affect the right of the employer's insurer under Section 29 of the Workmen's Compensation Law to bring an action against the third party for negligence. The text of the opinion is as follows:

COCHRANE, J.: The claimant was a driver and caretaker of mules and was injured while driving a mule across the tracks of the Binghamton Railway Company in the course of his employment by the appellant, E. W. Conklin & Son, Inc. He executed a release to the railway company without compensation or any consideration whatever and without the consent of the insurance carrier. Thereafter he elected to take compensation under the act. The sole question on this appeal is the effect of such release on his right to an award which has been made by the Commission against the insurance carrier.

Section 29 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) is as follows:

"§ 29. Subrogation to remedies of employee. If a workmen entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the Commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the State for the benefit of the State Insurance Fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the State Insurance Fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the State may be prosecuted or compromised by the Commission. A compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the Commission, if the deficiency of compensation would be payable from the State Insurance Fund, and otherwise with the written approval of the person, association or corporation liable to pay the same."

The scheme of this statute is simple and comprehensive. Concisely stated, one of the purposes is to make the third party ultimately liable for the consequences of his negligence if such liability exists, and that the insurer under the act, if there be one, shall have the benefit of such liability of a third party to the extent of an award which may be made by the Commission. The term "elect," as used in section 29, does not have the meaning which it frequently has of indicating a choice between two inconsistent remedies against the same party, the exercise of which choice in one direction

precludes action in another direction. That is apparent from the whole tenor of the section. The claimant may bring his common-law action against a third party, and if he does so he does not thereby discharge the insurer of his employer unless he recovers as much as he might be awarded by the Commission under the act, because the statute says that in such case "the State Insurance Fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case." On the other hand, if the claimant elects to take compensation under the act, his cause of action against the third party must be assigned to the insurance carrier who thereby becomes subrogated to such remedy of the claimant. And for the protection of the insurer the statute expressly provides that "a compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only \* \* \* with the written approval of the person, association or corporation liable to pay the same." Clearly, therefore, a compromise or release by an employee of his cause of action against a third party is ineffectual against the insurer without the written approval of the latter. The release in such case constitutes no obstacle in the way of the insurer prosecuting the assigned claim against the third party. One of the primary purposes of the statute is to protect the employee against his own improvidence, weakness, ignorance or shortsightedness in compromising his claim for injuries. And a reciprocal advantage or protection to the insurer is given in the form of a claim against any third party negligently causing the injury which cannot be destroyed by the act of the injured party without the written approval of the insurer. When a third party takes a release or settles a claim he does so with full knowledge of this statutory requirement that the compromise shall have the written approval of the person or corporation liable for compensation under the act, and that without such approval such release or compromise may not be asserted against the person or party whose approval is thus required. And the statute while protecting the workman does so without sacrificing or prejudicing the rights of either the insurer or the third party. The latter cannot be placed in any less favorable position because whatever he pays he cannot be called on to pay again, but if he compromises for less than his actual liability he remains liable to the insurer for such excess up to the amount allowed under the act unless the latter has consented in writing, as the statute provides, for the compromise at the less amount.

Furthermore, section 33 of the act provides that "claims for compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter." This of course means that claims for compensation under the act against the insurer may not be assigned, released or commuted, but if the employee without the approval of the person liable to pay the compensation under the act may release a third party and make such release effective against the insurer, then he is permitted to indirectly accomplish the defeat of this provision in section 33 and by settling with the third party release and discharge his claim for compensation under the act. This seems to constitute an additional argument why a release is ineffectual as against the insurance carrier unless it has the approval of the latter.

In the present case the claimant received nothing for the release in question, but if he had done so according to the views expressed it would make no difference except that the insurer would be liable only for the difference between the amount received and the compensation provided by the act.

The award should be affirmed.

WOODWARD, J., concurred in separate opinion.

WOODWARD, J. (concurring):

The award made by the State Industrial Commission was correctly reached and should be affirmed. The fact that the claimant executed a release of the Binghamton Railway Company from liability to him for the injuries which he received while driving a mule across that company's tracks does not destroy or in this instance affect his right to recover the compensation provided by the Workmen's Compensation Law.

In this particular case it does not appear that the Binghamton Railway Company was guilty of any negligence which operated as a cause of the claimant's injuries, and it affirmatively appears that the release was executed and delivered without payment to the claimant of any money or other consideration whatsoever. I think, however, that our decision of this appeal may well proceed upon the broader ground which makes no assumption of the non-liability of the recipient of the release or the absence of consideration for its execution. The purpose in the enactment of the Workmen's Compensation Law was to secure and insure to injured workers and their dependents the continued payment of a stipulated portion of their weekly earnings. This was to be done in order that trade accidents might be made a trade liability — a charge against the cost of the trade product — and not left to fall harshly and exclusively upon the injured worker and his family. To this end it was deemed desirable that the employer, through one of specified methods, should become responsible for seeing to it that payment of compensation was promptly and regularly made in the amount authorized by the statute regardless of whether the injury was in fact caused by some third person and was not due to anything arising in the ordinary course of the employer's business and under his sole control. One of the chief ends in view was to protect the worker from being compelled to resort to protracted and uncertain litigation for the establishment of his right to reimbursement on the one hand and to protect him likewise from his own improvidence, shortsightedness, lack of knowledge and urgency of financial necessities as factors entering into compromise or settlement negotiations concerning claims for injury.

As this court has hitherto observed, the Workmen's Compensation Law should be remedially and beneficially construed to effectuate the obvious legislative purpose. The appellant employer and insurance carrier contend here for a construction of the statute which would seriously cripple its efficacy. It is altogether clear, whether or not the claimant was injured through negligence on the part of the railway company, and whether or not the claimant received any consideration from the company for the execution of the release, that the statute does not, and the rules which the Commission has adopted under the explicit authority of section 29 of the act do not, permit the execution of a release by the claimant in favor of a third person to be construed as an election by the injured person to proceed by suit rather

than by taking compensation under the act. The claimant here concededly served no notice of election to proceed by suit, and neither the employer nor the insurance carrier consented to or approved the execution of the release to the railway company. Even the bringing of suit and the obtaining of judgment against the third party would not, under the statute, discharge the insurer unless his recovery in the action amounts to as much as the compensation provided for by the statute. In the event he recovers less than the statute provides may be granted as compensation, the insurer is liable only for the making up of the deficiency.

Where the injured person seeks compensation under the act his cause of action, if any, against any and all third persons in connection with the injuries is transferred to the insurance carrier, and the latter thereupon is subrogated to all the rights of the claimant by way of suit for damages by reason of the tort. In order that the insurer may be fully protected against the very thing which, perhaps, the injured man tried to do in this case, the statute explicitly provides that "a compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only \* \* \* with the written approval of the person, association or corporation liable to pay the same." (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 29.) No release executed by the claimant at bar without the consent of the insurer could, therefore, have any effect upon an action by the insurer against the railway company, except that if the railway company paid anything to the claimant—as was not the case here—the railway company is liable to the insurer and the insurer to the claimant only for the difference between the amount paid and the total of compensation payable under the statute. Award unanimously affirmed. *Woodward v. Conklin & Son, Inc.*, 171 App. Div. 736, March 8, 1916.

In *Cunningham v. Buffalo Copper & Brass Rolling Mills*, p. 282 above, the Commission is said to have disregarded an instrument signed by the injured employee subsequent to its award to him of two hundred and forty-four weeks' compensation, wherein he agreed to take in lieu a lump sum of one hundred and sixteen weeks: *Connor's Employers' Liability, Workmen's Compensation and Liability Insurance*, p. 144.

In *Powley v. Vivian & Co.*, 169 App. Div. 170, the text of which appears at p. 70, the contract between Powley and the company exempted each party from all acts of fault or omission by the other. The Appellate Division held this agreement ineffective relative to the Workmen's Compensation Law, as contrary both to the express prohibition of section 32 and to public policy.

## WHICH IS THE EMPLOYER?

A number of accidents under the Workmen's Compensation Law have involved a doubt as to which of two employers ought to pay the compensation. At bottom they have been contractor cases.

A truckman sent one of his teamsters to haul sand for a company. The company had complete direction of the teamster's work. It was held liable, rather than the truckman, for a fatal accident to the teamster, *Gimber v. Kane Co.*, S. D. R., vol. 2, p. 475, November, 1914. The Appellate Division unanimously affirmed the Commission's ruling without opinion upon the authority of *Miller v. North Hudson Contracting Co.*, 166 App. Div. 348, March 3, 1915, a Labor Law case determinative of the question when the relation of employer and employee exists: *Gimber v. Kane Co.*, 171 App. Div. 958, November, 1915. A similar case evoked similar decisions in *Nolan v. Cranford Co.*, S. D. R., vol. 4, p. 337, March 23, 1915; 171 App. Div. 959, November, 1915.\*

A lighter was chartered by one company from another. The owning company, rather than the chartering company, was held liable for injuries received by the captain of the lighter while the vessel was loading, *Norman v. Empire Lighterage & Wrecking Co.*, S. D. R., vol. 2, p. 480, January 9, 1915.

An employer contracted with a tank and boiler company to erect a plant for it. One of his employees having been injured, he, rather than the tank and boiler company, was held liable, *Landrigan v. Cochran*, S. D. R., vol. 6, p. 310, October 4, 1915.

A company hired a watchman to another company to watch its cargoes. During the night the watchman stumbled and fell, receiving injuries that resulted in death. The company that let his services, rather than the company that owned the cargoes, was held liable, *Oberg v. McRoberts & Co.*, S. D. R., vol. 6, p. 386. December 20, 1915.†

\* The Nolan decision was affirmed by the Court of Appeals without opinion: 219 N. Y. Rep. —, Oct. 24, 1916.

† The award in this case was reversed and set aside by the Appellate Division, November 15, 1916, on the ground that the occupation of watchman is not a hazardous employment.



One stevedore loaned an employee of the "shenango" type to another. The employee had been working for the latter but a few moments when he was hurt. An award against the first stevedore was reconsidered by the Commission and transferred against the other, *Sala v. Martorella & Giannesi*, S. D. R., vol. 7, p. 378, January 18, 1916.

In the earliest of these cases, *Gimber v. Kane Co.*, the Commission based its decision upon the principle laid down in certain negligence cases and the award was later affirmed by the Appellate Division without opinion. In the case of *Landrigan v. Cochran*, the attorneys suggested that the Commission make a finding against both of the employers. They argued that, since the contracting employer was pecuniarily irresponsible "only such an award would be of any practical benefit to the injured employee." This suggestion of a double award was approved by the Appellate Division in the later and leading decision of *Dale v. Saunders Bros.* The services of Dale as a driver were let by Saunders Bros. to Patrick Walsh together with a wagon and team (S. D. R., vol. 5, p. 372, July 16, 1915). Dale received mortal injuries from the caving of a sand pit owned by Walsh. In affirming an award against Saunders Bros. the Appellate Division said:

The fact that the owner of the sand pit might be liable under the law, does not absolve the general employer. Dale was required to drive his team where the Saunders Brothers directed and by requiring him to go into the sand pit and subjecting him to the increased danger there, they cannot relieve themselves from the ordinary duties and liabilities to their teamster. The fact that under the provisions of this law the employment might fall within two or more different groups and thereby two or more different persons might be liable to make the compensation, does not prejudice the injured employee or his family. It furnishes an additional guarantee that payment will be made. The general employer, where the injury occurs within the lines of the general employment, is liable and that liability is not destroyed by the fact that the special employer may also be liable, thus giving the employee a choice of remedies with but one compensation.

The Appellate Division was divided in this Dale case. The majority opinion, unlike the opinion in the Gimber case, declared independence of negligence precedents. "The law of negligence," said the court, "the rules relating to master and servant, the rule as to the inability to serve two masters, are of but little value

here." In a dissenting opinion Justice Woodward held that the court must reverse the award to be consistent with its decision in the *Gimber* case. In April, 1916, the Court of Appeals unanimously affirmed the Appellate Division's decision. The majority opinion of the Appellate Division and Justice Woodward's dissenting opinion are as follows:

KELLOGG, P. J.: Saunders Brothers, appellants, were makers of brick, and Dale was one of their teamsters. The sworn report made by them to the Commission states concisely the manner in which he met his death. "I sent him for a load of sand, while there it fell. Sand bank fell, and he died the next day."

Saunders Brothers were drawing this sand for profit, and Dale was their teamster; the fact that his team was not moving when he was injured, and that he was loading sand in the wagon in order to draw the load to Auburn, does not deprive him of the benefit of this law. He was operating the wagon just as much as if he had been driving on the road. The operation of a wagon or truck, referred to in group 41 of section 2 of the Workmen's Compensation Law, is not confined merely to the moving vehicle, but relates to anything incident to the employment, such as caring for the horse in the stable after the day's work is done, as we held in *Matter of Smith v. Price* (168 App. Div. 421). The loading and unloading of the wagon, the necessary care and attention to the wagon and to the horses, any act which falls within his duty as a teamster, is within the protection of the law.

If a brickmaker requires his teamster to use his team temporarily in carting for a neighbor, the employee does not thereby lose the protection of this law. Such service may be treated as an incident to his general employment. He is not to determine as to the business of his employer, but must do as he is told, and the employer is responsible for the results.

That the injury was one arising out of and in the course of his employment by said appellant is apparent. The award, therefore, is clearly within the provisions of the Workmen's Compensation Law. The employment was a hazardous one within group 19 and also within group 41.

It is urged, however, that in the case of *Matter of Gimber v. Kane Co.* (2 State Dept. Rep. Official, 475; affirmed by this court without opinion, 171 App. Div. —), upon substantially similar facts an award was made against the proprietor of the sand pit, and it is claimed that if we were right there, the Commission is wrong here. In my judgment either the proprietor of the sand pit, the special employer, or the general employer, the brickmaker, is liable in this case. As has frequently been said the Workmen's Compensation Law is a new departure in giving a remedy to a workman for an injury received in a hazardous employment. The loss from such injury is placed without regard to fault upon the employment to the relief of the employee. It is considered a part of the cost of the product resulting from the employment and is thus charged upon the ultimate consumer. In addition to this, it was fairly within the intent of the law that by making these hazardous employments liable for all injuries occurring in them without regard to fault, the employer would exercise the utmost care to prevent accidents. The act

provides a summary remedy disregarding the ordinary procedure and rules of evidence and prescribes radical presumptions in favor of the claimant. The law of negligence, the rules relating to master and servant, the rule as to the inability to serve two masters, are of but little value here. The statute itself has removed these questions to quite an extent from our consideration. It names the hazardous employments; it defines an employee as a person engaged in such employment in the service of the employer, and defines the employer as a person employing workmen in such employment. When the statute defines the employer as one employing men in a hazardous employment, it does not necessarily mean that he is hiring a servant by a personal contract with him, but it means that he is using or engaging the man in a hazardous work. It is not a question of hiring, or of master and servant, but of using and putting the man in the hazardous employment which the act has in view. The name of the act, "Workmen's Compensation Law," indicates that it is not to be limited to cases where the actual relation of master and servant exists, but to workmen and those employing or using them in the manner stated. When it appears that a person is carrying on such hazardous employment for profit and that a person in his service or who he is employing or using therein receives an injury, compensation follows.

Clearly the proprietor of the sand pit must get his sand to market and must use men and teams for that purpose, and, when he arranged from time to time with the Saunders that they were to furnish him with teams to draw sand at the rate of four dollars and fifty cents per day figured at four loads of sand as a day's work with the right to draw the four loads in one or on different days, it is easy to say that the driver, within the meaning of the act, was engaged in the hazardous employment of "sand \* \* \* pits," and that the proprietor was employing or using him in the hazardous business which caused his death.

He was there for two reasons: (1) Because he was in the employ of the Saunders Brothers, as their driver, and was loading the sand in their wagon, as his duty as their driver required him to do. (2) The proprietor of the sand pit employed the use of the team and driver to enter into the sand pit and draw the sand therefrom. The driver was, therefore, engaged in two hazardous employments, the ordinary business of a teamster, and working in and about a sand pit. The proprietor of the sand pit had two regular helpers there who assisted the teamster in loading the wagon. It is difficult to see upon what theory the law could make the owner of the pit liable to those men and not to the teamster if all were hurt while working side by side in loading the wagon.

If the driver was accidentally injured while drawing the sand upon the highway by falling from the wagon or in any way not connected with the sand itself, it cannot be claimed that the special employer, the sand pit proprietor, would be liable. The same may be true as to an ordinary accident happening upon the sand pit premises but not connected with the hazards of the pit itself. But when the accident is caused, as in the *Gimber* case and in this case, by the sand in the pit falling upon the person where the proprietor had put him to work, the liability may fall upon the proprietor of the pit. As we have said, the law of master and servant does not necessarily control here. The question is, was the employee engaged in a hazardous employment in the service of the defendant or of the sand pit proprietor, or of both?

The fact that the owner of the sand pit might be liable under this law does not absolve the general employer. Dale was required to drive his team where Saunders Brothers directed, and, by requiring him to go into the sand pit and subjecting him to the increased danger there, they cannot relieve themselves from the ordinary duties and liabilities to their teamster. The fact that under the provisions of this law the employment might fall within two or more different groups and thereby two or more different persons might be liable to make the compensation does not prejudice the injured employee or his family. It furnishes an additional guaranty that payment will be made. The general employer, where the injury occurs within the lines of the general employment, is liable, and that liability is not destroyed by the fact that the special employer may also be liable, thus giving the employee a choice of remedies with but one compensation. I, therefore, favor affirmance.

All concurred except WOODWARD, J., dissenting in opinion in which HOWARD, J., concurred.

WOODWARD, J., (dissenting):

Saunders Brothers, the alleged employers, are engaged as manufacturers of brick at Fleming, near Auburn. They employ a number of teamsters to drive their wagons, and from time to time Saunders Brothers have furnished these teams, with drivers, to one Patrick Walsh, who conducted a sand bank near by, for the purpose of delivering sand to patrons at Auburn. Frank Dale was one of the teamsters so employed, and on the 10th day of October, 1914, was sent by Saunders Brothers to Patrick Walsh for the purpose of performing this delivery service for the said Walsh. The team and wagon were placed by the servants and employees of Walsh, and while Dale was engaged in shoveling sand into the wagon the sand from the bank caved in, falling upon Dale, producing injuries which resulted in his death the following day. The State Industrial Commission as the successor to the State Workmen's Compensation Commission, has awarded damages to the widow and children against Saunders Brothers and their insurance carrier, and these appeal to this court upon the ground that Dale was, at the time of the accident, in the special employ of Walsh, who became liable for the injuries. In this contention the appellants are clearly in harmony with this court in *Matter of Gimber v. Kane Co.* (171 App. Div. 958) and unless we were in error in that case the determination in the present case cannot stand. No distinction can be made in the facts, so far as we are able to discover; in both cases the driver was employed generally by one party and was by each party hired out, with a wagon and team, to another, and while so employed was injured in the performance of the duties of the particular occupation. We there held, upon the authority of *Miller v. North Hudson Contracting Company* (166 App. Div. 348), that the employee became the servant of the corporation conducting the particular work, and that such corporation, or its insurance carrier, was liable for the damages, affirming the award of the Commission. Just how the Commission, upon practically the identical state of facts, can now be permitted to make an award against the original employer we are unable to understand.

The theory of the Workmen's Compensation Law, as we understand it, is that the particular industry in which the accident occurs is to bear the loss; it is to become a charge upon the production of such enterprise (*Ives v.*

*South Buffalo R. Co.*, 201 N. Y. 271, 286), and if Dale had been injured while delivering brick for the initial employer, a manufacturer of brick, this would have come within the theory of the law. But nothing of the kind occurred; the accident happened to Dale while he was engaged in the work of operating a sand bank. He was generally employed as a teamster, but he was specially engaged at the time of the accident in shoveling sand from a sand bank into a wagon in company with others—he was doing the work of Patrick Walsh, whose business was that of an operator of a sand bank, under group 19 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), and it was this industry which should, under the theory of the law, be charged with the damages. The statute provides (§ 2) that the "compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous occupations," and (§ 3, subd. 4) that "employee" means "a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer," and (§ 10) that every employer shall provide compensation "for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment." "Personal injury" is defined by the statute (§ 3, subd. 7) to "mean only accidental injuries arising out of and in the course of employment," and "employment" is defined (§ 3, subd. 5) as including "employment only in a trade, business or occupation carried on by the employer for pecuniary gain," and an "employer" is defined (§ 3, subd. 3, as amd. by Laws of 1914, chap. 316) as one "employing workmen in hazardous employments." Saunders Brothers were, it is true, engaged in one of the hazardous employments, but Dale was not injured because of anything arising out of and in the course of his general employment as a teamster in operating a brick-making plant; he was injured to his death while performing a special employment in a sand bank. He was not engaged in the "operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules" (§ 2, group 41), but was performing the work of a shoveler of sand, and this employment was being carried on by Walsh for pecuniary gain; he was the employer who was engaged in the particular hazardous occupation in which Dale met his death, and an "employee" is, as we have seen, "a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same [employment] upon the premises or at the plant, or in the course of his employment away from the plant of his employer." Saunders Brothers had no occasion to use Dale in shoveling sand; they were not engaged in this hazardous occupation. They were manufacturers of brick, and having more teams and men than they needed to use in their own business at this particular time they temporarily transferred their team and driver to the service of Walsh, and it was while this operation of a sand bank—the hazardous occupation of Walsh—was in progress that the accident happened. Clearly, if the spirit of the act is to have effect, and the accidents of a given industry are to become a charge upon the product of such industry and be absorbed by the purchasers of that product (*Ives Case, supra*), then the injuries which Dale sustained become a proper charge, not

upon Saunders Brothers, but upon Walsh, whose industry was being developed through the efforts of Dale. A long line of cases in law actions sustain the theory that the employee of a general employer may become the employee of a special employer, and we believe that the doctrine is peculiarly applicable to the case presented upon this appeal. At any rate this court is committed to the doctrine, and this calls for a reversal of the award.

The award of the Commission should be reversed and set aside. HOWARD, J., concurred. Award affirmed. *Dale v. Saunders Bros.*, 171 App. Div. 528, Mar. 8, 1916.

In affirming the Appellate Division's order the Court of Appeals said nothing explicit concerning the responsibility of Walsh, the special employer, but upheld the principle of independence of negligence precedents. "The doctrine of *respondet superior* has no application here," said the court, "nor are the rules of employer's liability controlling." The court also ruled that the question whose employee Dale was belonged solely to the Commission, as a matter of fact and not of law, the courts being denied jurisdiction.

The text of the Court of Appeals' decision is as follows:

POUND, J.: This is an appeal by Saunders Brothers, the general employer, from an order of the Appellate Division, third department, affirming by a divided court an award of the Workmen's Compensation Commission made to Rose Dale, widow, and to the children, for the death of Frank Dale. The only question in the case is whether Dale was employed by Saunders Brothers at the time of his death within the meaning of the Workmen's Compensation Act. Saunders Brothers urge that he was the special employee of one Walsh and that the special employer should pay and the general employer should not. The facts are undisputed and are as follows:

On October 10, 1914, the day when Dale received the injuries resulting in his death, he resided at 26 Cornell street, Auburn, New York, and was on that date, and for several years prior thereto had been, employed as a driver of a team and wagon by Saunders Bros., who were engaged in the business of brick making at Auburn, New York. Saunders Bros. also hired out their teams for trucking purposes and furnished drivers with the teams and received therefor \$5.50 a day for driver, team and wagon. Walsh owned a sand bank adjoining the brick yard of Saunders Bros., one outlet of which was through the property of Saunders Bros. On said date Walsh requested of Saunders Bros. a team, wagon and driver for the purpose of having some sand delivered to Walsh's customers in the city of Auburn. Saunders Bros. sent Dale with a team and wagon. This arrangement was frequently made between Saunders Bros. and Walsh. Upon receiving from Walsh an order for a team, Saunders Bros. selected the driver to go on the work with the team. The wages of Dale were paid by Saunders Bros., namely, \$2.00 per day, Saunders Bros. receiving from Walsh for the team and driver \$5.50 per day. The duties of Dale were to go to the Walsh sand pit, load his wagon with

sand, and deliver the sand in the city of Auburn at places designated by Walsh. Walsh had no power to discharge Dale nor any control over him except to direct where the sand should be taken. Saunders Bros. saw Dale about every two hours during the day and sometimes gave directions as to how Dale should drive. On said date while Dale was assisting in loading the sand into the wagon on Walsh's premises, a sand bank fell on him, and crushed him against the wagon, causing injuries from which he died the same day.

In negligence cases the question often arises as to the proper application of the doctrine of *respondet superior* when an employee whose negligence causes an accident is at the time in the general pay and service of one and under the control and direction of another. The latter has been held liable as a special employer when it could be said that the employee was his servant at the time of the accident in a sense and degree which served to impose liability for negligence. (*Higgins v. Western Union Telegraph Co.*, 156 N. Y. 75; *Howard v. Ludwig*, 171 N. Y. 507.) The question, who is the master, also arises at times in employees' actions for negligent injuries. But the question in this case is not one of responsibility for negligent injury inflicted upon strangers nor upon an employee. The doctrine of *respondet superior* has no application here, nor are the rules of employers' liability for negligence controlling. Compensation provided for in the Workmen's Compensation Act is payable for injuries sustained or death incurred by employees engaged in specified hazardous employments carried on by the employer for pecuniary gain (Workmen's Compensation Law, § 3, subd. 5), including the operation on streets and elsewhere of wagons drawn by horses. (Workmen's Compensation Law, § 2, group 41.) The word "employee" means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer. (Workmen's Compensation Law, § 2, subd. 4; *Matter of Post v. Burger & Gohlke*, 216 N. Y. 544.) Saunders Bros. carried on the business of trucking for pecuniary gain. No claim is made that Walsh was carrying on the business of trucking for pecuniary gain. Dale was working for Saunders Bros. as a teamster when he met the accident that caused his death. He was engaged in teaming, not in "the operation of a sand pit." (Workmen's Compensation Law, § 2, group 19.) The duties of a teamster properly include the loading of his wagon, and are not limited to the driving of the team. (*Matter of Costello v. Taylor*, 217 N. Y. 179.) All this seems clear, but in any event the decision of the commission is final as to questions of fact. (Workmen's Compensation Law, § 20.) The jurisdiction of this court is limited to the review of questions of law, and if any question is presented upon the facts stated as to whose employee Dale was it is one of fact only. (*Howard v. Ludwig*, *supra*; *Kellogg v. Church Charity Foundation*, 203 N. Y. 191.)

The order of the Appellate Division should be affirmed, with costs.

WILLARD BARTLETT, Ch. J., COLLIN, CUDDEBACK, HOGAN and SEABURY, JJ., concur; HISCOCK, J., concurs in result. Order affirmed. *Dale v. Saunders Bros.*, 218 N. Y. 59, April 25, 1916.

## STATE FUND MANAGEMENT

(Workmen's Compensation Law, §§ 90-106)

Doubts relative to the custody and investment of the State Fund surplus or reserve and relative to the State Industrial Commission's power to assess State Fund policy holders for catastrophe losses, to group them individually for rating and dividend purposes and to cancel their policies for non-payment of premiums have called forth the four opinions of the Attorney-General following.

A. *State Fund Surplus or Reserve.*—The custody and management of the State Fund surplus and reserves are governed by Workmen's Compensation Law, §§ 91-93. The Attorney-General has supplemented the law's directions in the following letter to the State Industrial Commission:

In reference to the questions which have arisen between you and the State Treasurer, would say that it is the opinion of this office that the surplus or reserve fund belonging to the State Insurance Fund, whether in cash or securities, should at all times be in the custody of the State Treasurer; that in making investments there should be no gap between the payment of money and the delivery of securities. The method of investing, of course, is a matter of administration that can undoubtedly be done in the manner talked over when you had the conference with the State Treasurer, by placing your order for the purchase of securities with the bank with which the money is deposited.

In reference to the registration of bonds or securities, however, we do not think it necessary that they should be registered in the name of the State Treasurer, providing he has the possession and custody thereof, and as it is not necessary that they should be registered in his name, it would not be good business practice to do so, as it would make an additional detail in the handling of the securities. *Letter of Attorney-General, October 23, 1915.*

B. *Assessment of State Fund Insurers.*—The incidental reference to assessment of state fund insurers in Workmen's Compensation Law, § 100, has given rise to considerable controversy. The casualty companies have used it as a competition argument. The subject is not mentioned elsewhere in the law. The Attorney-General suggests that the presence of the clause in § 100 is an oversight of the bill drafters. He declares that the Commission's



powers are inadequate for the levy of assessments upon state fund policyholders. The opinion is as follows:

Employers who insure in the State Insurance Fund and have paid the premiums required by the statute are not subject to further liability by assessment. Insurance in the State Fund is not regarded as insurance in a mutual associations of employers.

#### INQUIRY

Are the employers who insure in the State Insurance Fund subject to the same possible assessments in excess of premiums paid as employers insuring in any mutual compensation company?

#### OPINION

Section 100 of the Workmen's Compensation Law (chap. 816, Laws of 1913, as re-enacted and amended by chap. 41, Laws of 1914) provides as follows:

Any employer may upon complying with subdivision 2 or 3 of section 50 of this chapter, withdraw from the fund by turning in his insurance contract for cancellation, provided he is not in arrears for premiums due the fund and has given to the commission written notice of his intention to withdraw within thirty days before the expiration of the period for which he has elected to insure in the fund; *provided that in case any employer so withdraws, his liability to assessment shall, notwithstanding such withdrawals, continue for one year after the date of such withdrawals as against all liabilities for such compensation accruing prior to such withdrawals.*

In view of this section of the law, it has been the belief of some that policyholders insuring in the State fund are subject to assessments as provided in the above section.

On May 23, 1915, the following resolution appears to have been adopted by the Workmen's Compensation Commission:

Whereas, Section 100 of the Workmen's Compensation Act relating to withdrawal from the State fund provides that in case any employer withdraws, his liability to assessments shall, notwithstanding such withdrawal, continue for one year after the date of such withdrawal as against all liabilities for such compensation accruing prior to such withdrawal; and

Whereas, It has come to the attention of the commission that there exists an impression that there is a liability on the part of employers insured in the State fund to be assessed by the commission in addition to the amount of premium; and

Whereas, The act contains no other provision whatever relating to assessment and the commission believes that the law confers no power to assess any policyholder for any amount in excess of the premium paid; therefore, be it

Resolved, That the commission declares its judgment to be that it has no right or authority under the act to levy an assessment on any policyholder.

It is my judgment that the commission has properly ruled in this matter.

I fail to find any provision in the compensation law which authorizes the commission to assess any policyholder for any amount in excess of the premium paid unless it can be inferred from the language used in section 100 in connection with the power which has been granted to the commission under section 67 of the Workmen's Compensation Law (chap 41, Laws of 1914, as amended) which provides that the commission shall make reasonable rules not inconsistent with this chapter regulating and providing for "carrying into effect the provisions of this chapter" or regulating and providing for "the collection, maintenance and disbursement of the State insurance fund."

Section 53 in providing for the payment of premiums into the State fund and thereby relieving the employer from all liability for injuries to his employees seems to assume that the payment of premiums is the only payment required.

Section 90 sets forth the elements which go to make up the fund and does not mention assessments.

Section 92 provides for setting aside, from the premiums, a surplus and reserve to cover catastrophies and anticipated losses and to carry all claims and policies to maturity. There is no language here to indicate any further requirement as to assessment.

Section 94 provides for charging the administrative expense later to insurance carriers including the State fund but no mention is made of assessing employers insuring in either.

Section 96 permits the commission to adjust premiums but there is no indication that this does not relate entirely to future policies. It would violate the obligations of a contract, if otherwise, and would be unconstitutional. It further requires the commission to fix the rates of premium so as to keep the fund solvent and create a reasonable surplus and reserve.

Section 97 further adds requirements as to adjusting the premium rates in accordance with loss ratios in various groups but additional assessments are not mentioned.

The same section provides machinery for dividing and crediting an aggregate balance above what is necessary for adequate surplus and reserve so as to give the employer the benefit of it on his next premium. There is no mention made in this section, however, as to an assessment being levied to provide for a deficiency.

Provision is also made in this section for an adjustment of the amount of premium at the end of the six months' period when the actual amount is determined in accordance with actual wage expenditure but this is not an assessment within the meaning of section 100.

Section 99 in providing for action for the collection of payments required by the commission has no application in the absence of further express authorization, in the statute, of the commission to require payments other than the regular premiums.

I have not seen any form of contract or policy in connection with insurance in the State Fund. I presume, however, in view of the resolution of the commission of May 23d, in which the commission states it to be its belief that it has no power to assess any policyholder, that there is no contract provision in existing policies requiring the payment of such assessments.

The question remains whether liability to assessments being recognized as existing in section 100, the commission has power to make regulations to cover the case either on the theory that it is "carrying into effect the provisions of this chapter" or on the theory that it is part of the "collection, maintenance and disbursement of the State Insurance Fund?"

I do not believe that it can be said that the Legislature has provided for the levying of an assessment on policyholders in the State fund when we find that the only mention of it is in a section permitting an employer at the expiration of his policy to take out one of the other recognized forms of insurance. It may be that this provision in section 100, dealing with assessments, was placed in that section with the expectation that machinery would be provided elsewhere for the levying of such an assessment or that at the time it was inserted there was actually in the bill being drafted a suitable provision for the levying of such an assessment which was subsequently removed.

If the statute had somewhere expressly granted to the commission the power

to levy an assessment for the benefit of the State fund, instead of incidentally referring to it as an existing power, then the provisions of section 67, authorizing the commission to make rules to carry into effect the provisions of this chapter could be applied. "I believe the courts would be reluctant to approve of a delegation of legislative power to the commission to determine not only the machinery for the levy of the assessment, but the limitations of the assessment itself, where no such assessment was directly authorized."

Neither do I believe that the commission has ower to cover this case under subdivision 9 of section 67 permitting it to make regulations providing for "collection, maintenance and disbursement of the State insurance fund," for the same reasons. *Opinion of Attorney-General*, July 16, 1915.

C. *Groups of Individual Employers.*—The determination of hazards and premium rates and dividends of workmen's compensation insurance for private insurance corporations or associations must have the approval of the State Superintendent of Insurance (Insurance Law, § 67, added by L. 1914, ch. 16, and § 190, added by L. 1913, ch. 832 and am'd by L. 1916, ch. 393). Such determination for the State Fund belongs to the State Industrial Commission subject to Workmen's Compensation Law, § 95, the Commission therefor being vested with large powers relative to alteration and re-grouping of the forty-two original groups of Workmen's Compensation Law, § 2. To simplify its task the Commission by combination reduced the original forty-two groups to six. But with a view to inducing large employers to insure with the State Fund, it instituted the practice of establishing special groups outside of the six groups, each such special group to consist of an individual employer with a minimum pay-roll exposure of approximately 2,500 employees. The benefits of this method to the State Fund, its attractions for the large employer and its general reasonableness are presented at length in the report of the State Fund Manager in the Annual Report of the Department of Labor for 1915. By means of it, the State Fund was able to offer to the large employer special rate and dividend advantages. The private insurance corporations, as rivals of the State Fund for business, objected strenuously to the practice. The Attorney-General was called upon to interpret the powers of the Commission under § 95. He ruled as follows:

The only way in which a single employer in the State fund can be separately grouped is where the nature of his business and the degree of risk or injury is such that he, in fact, represents a group by himself, subject, however,

to the opportunity of other employers coming within its limitations to be made members of that group; and the only way in which a single employer in the State fund can secure a rate different from that allowed to other employers in such fund of the same group is through a system of schedule rating, as provided in the last sentence of section 95. But, for dividend purposes, even an employer so rated still remains in the group in which he is placed and dividends must be declared as the result of the total experience of the group of which he is a member for the premium period.

The full text of the opinion is as follows:

The State Industrial Commission submitted an inquiry as follows: "Can the State Industrial Commission under section 95 of the Workmen's Compensation Law (Laws of 1914, chap. 41), in rearranging the groups set forth in section 2 thereof, set up an individual employer in a separate group?"

It appears that there are certain employers in the State having a very large and varied group of employees. The State Industrial Commission using the power conferred by section 95 of the Compensation Act to rearrange groups, has in some instances set up such an individual employer in a separate group, upon the theory that the word "group" may be defined or construed for purposes of administering the State insurance fund as properly applicable to an individual employer having a pay-roll exposure sufficiently large to afford a satisfactory insurance distribution. It is the practice in declaring dividends to credit to such an individual employer constituting such an individual group, any balance of his premium remaining after paying all losses on his account, and after setting up the loss reserves and catastrophe surplus required by section 97 of the act. This dividend is credited upon the next installment of premium due the State fund. My opinion is asked whether this is permissible under the act.

There is no definition of the term "group" in the act. For the purposes of sections 95 and 97 and from the point of view of insurance administration, the Commission seems to construe the word "group" as meaning an insurance unit. They say: "The test of what constitutes an insurance unit is to be found not in the number of employments or employers in any case, but in the amount of the pay-roll exposure. For purposes of administering the State insurance fund, it is not proper to recognize as a 'group' any number of employments or any number of employers, whose total pay-roll exposure is too small to afford a satisfactory insurance distribution. On the other hand, it is entirely proper to set up as a 'group' within the meaning of the act, any individual employment or any individual employer with a pay-roll exposure sufficiently large to give a satisfactory insurance distribution. In determining what amount of pay-roll exposure shall be taken as affording a satisfactory insurance distribution, the rule adopted by the State insurance fund calls for a pay-roll of approximately twenty-five hundred employees, or an expenditure of about twenty thousand dollars per week. Any line drawn here must be of necessity somewhat arbitrary, but it is generally recognized by actuaries that a pay-roll exposure representing twenty-five hundred employees, or twenty thousand dollars per week is sufficiently large to yield a proper insurance distribution. In other words, any individual employer or any number of employers in the same trade, having a pay-roll exposure of this size, constitutes

what may be termed a real insurance unit. This is recognized by the provisions of the Insurance Law governing the formation of mutual companies which lays down as one of the conditions for the formation of such a company a pay-roll of at least twenty-five hundred employees. I submit that this interpretation of the word 'group' as meaning an insurance unit composed of either a number of employments or employers, or consisting of a single employment or employer with a sufficient pay-roll exposure to afford a satisfactory insurance distribution, is a reasonably and proper one especially in view of the absence of any definition of this term in the act, and the precedent established by the official interpretation placed upon the word 'group' as used in a similar provision of the Massachusetts act."

#### THE STATUTE

The following are the provisions of the statute (Workmen's Compensation Law) which bear upon the subject of grouping:

§ 2. Compensation \* \* \* shall be payable for injuries \* \* \* incurred by employees engaged in the following hazardous employments: Group 1. The operation, including construction and repair, of railways operated by steam, electric or other motive power, street railways and incline railways \* \* \*

(This section then goes on to divide the hazardous employments subject to the law into forty-two groups, each being numbered consecutively.)

§ 90. There is hereby created a fund, to be known as 'The State Insurance Fund', for the purpose of insuring employers \* \* \*. Such fund shall consist of all premiums received and paid into the fund. \* \* \*. Such fund shall be applicable to the payment of losses sustained on account of insurance \* \* \* in the manner provided in this chapter.

§ 96. Classification of risks and adjustment of premiums. Employers \* \* \* shall be divided, for the purposes of the state fund, into the groups set forth in section two of this chapter. \* \* \*. Separate accounts shall be kept \* \* \* in respect to each such group for convenience in determining equitable rates.

§ 95. \* \* \* But, for the purpose of paying compensation, the state fund shall be deemed one and indivisible. The commission shall have power to rearrange any of the groups set forth in section two by withdrawing any employment embraced in it and transferring it wholly or in part to any other group and from such employments to set up new groups at its discretion. The commission shall determine the hazards of the different classes composing each group and fix the rates of premiums therefor based upon the total payroll and number of employees in each of such classes of employment at the lowest possible rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve; and for such purpose may adopt a system of schedule rating in such a manner to take account of the peculiar hazard of each individual risk.

§ 97. Requirement in classifying employment and fixing and adjusting premium rates. \* \* \*

1. The commission shall keep an accurate account of the money paid in in premiums by each of the several classes of employments and industries, and the disbursements on account of injuries and deaths of employees thereof, \* \* \* and also on account of the money received from each individual employer and the amount disbursed \* \* \* on account of \* \* \* such employer.

2. On January first, nineteen hundred and fifteen, \* \* \* a readjustment of the rate shall be made for each of the several groups of employments or industries and of each hazard class therein, which, in the judgment of the commission, shall have developed an average loss ratio.

3. If any such accounting show an aggregate balance (deemed by the commission to be safely and properly divisible) remaining to the credit of any class of employment or industry, \* \* \* the commission may in its discretion credit to each individual member of such group, \* \* \* such proportion of such balance as the amount of his prior paid premiums sustains to the whole amount of such premiums paid by the group to which he belongs, since the last readjustment of rates.

WOMBURY, Attorney-General.—The Commission seems to feel that the establishment of individual groups in the State insurance fund is in the interest of the safety and solvency of the fund, and for the benefit of all employers and employees insured in it, and that large employers of labor are thereby induced to take insurance in the State insurance fund in preference to carrying their own risks as self-insurers. The Commission claims that it is of

benefit to not only the employers so grouped, but also the State insurance fund as a whole, and the other employers insured in it, since it increases the financial strength and stability of the fund by enlarging its premium income, its loss reserves and its catastrophe surplus, and reduces the cost of insurance to every policy holder by lowering the proportion of overhead charges falling upon the individual employer. It is said to be of advantage, also, to the employees of policy holders placed in individual groups, as it furnishes the strongest possible incentive to improve the safety equipment of plants.

That the language of section 95 is very broad, conferring upon the Commission large powers to combine and rearrange groups, to divide and subdivide employments, to transfer any employment wholly or in part, to any other group set forth in section 2, and from such employments set forth in section 3, to set up new groups at its discretion, is undoubted. Moreover, assuming for the purpose of argument, that the language of the statute is broad enough to imply authority for the Commission to create such a plan of individual grouping, the question of its expediency and advisability, regarded from the point of view of business policy and insurance economics, is one that must obviously be determined by the judgment of the Commission. I am concerned only with the legality of such a method. If the Commission holds it to be sound and wise to set up individual employers in separate groups, the attitude of the Commission should be sustained, if the language of the act may reasonably be construed as conferring or implying authority for such action.

It will be seen that sections 95 and 97, bearing on the classification of risks and the fixing and adjusting of premium rates and the declaring of dividends, treat employers who are insured in the State fund from three different standpoints, namely, that of a "group," that of a "class" and that of an "individual."

Etymologically the term "group" means two or more things having some relation to each other. Words in a statute must be deemed to have been used in their ordinarily accepted meaning, unless the contrary can be shown to appear from the context. Therefore, the very use of the word "group" standing alone, would seem to indicate an intention of the Legislature that there should be more than a single individual employer in any "group," unless the nature of his business is such that he is the only one transacting business of that kind within the State, or unless the peculiar hazard of his business is such as to make it susceptible of a separate classification; but in either event, whether from the standpoint of the nature of the business or the degree of risk of injury, it would seem that the "group" idea could only be carried out, within the ordinary meaning of that term, by making the classification available to all employers coming within the limitations thereof. The Legislature has exemplified the "group" idea in section 2 of the act and, in the absence of definition, it would seem that nothing less could be conveyed by the use of the word "group" in section 95 than is concretely illustrated in section 2. For example, if the Commission, for State fund purposes, should create a group of which all employers of a certain class might become members, and only one of them should insure in the State fund, this could be a "group" within the meaning of the statute. The grouping would consist in the classification whereby the door would be open to all employers of the same class having the same hazard to come in at any time and enjoy the same classification and receive the same treatment.

This view is strengthened, rather than otherwise, when we consider the context. The statute uses the word "class" as well as "group." Section 95 mentions "classes composing each group" and "such classes of employment." Evidently classes were intended to be subdivisions of groups. Similar phrasing is used in section 97, namely, "each of the several classes of employment or industry" and "any class of employment or industry," while what a "class" is is pretty clearly indicated by the use of the word "hazard class" in subdivision 2 of section 97.

Really then a "class" within the meaning of this statute is a part of a "group" and must be, in an insurance sense, composed of employments having the same hazard.

That these classes are to be made up of individual employers having the same hazard, if more than one such employer exists and is insured in the State fund, seems clear from the language of section 95, providing that "the commission shall determine the hazards of the different classes composing each group," and from the use in subdivision 3 of section 97 of the words "each individual member of such group." This subdivision, having to do with dividends, indicates that dividends must be paid by group rather than class, and that as a member of a group his dividend is limited to such proportion as the amount of his prior paid premiums sustain to the whole amount of such premiums paid by the group to which he belongs.

That classes may, *in effect*, be made up of individual employers seems clear from the last sentence of section 95, namely, for the purpose of fixing rates of premiums. The Commission is permitted to fix the rates of premiums, based upon the total payroll and the number of employees in each of the classes composing such group and "may adopt a system of schedule rating in such a manner as to take account of the peculiar hazard of each individual risk." In other words, the Commission is permitted to discriminate in the making of rates, but the nature of so doing is not arbitrary, but is presumed to take into account some hazard, or protection against some hazard, as for example, the number and variety of employees, as giving a special experience for insurance purposes, and the amount of safeguard preventatives of accident, adopted as part of the equipment or system of an employer, and which might justly entitle him to be classified as a separate class or risk, because of his peculiar hazard, and because he really represents at the time a class within a group.

The law thus seems to permit the Commission to create new groups, but each group should be available to all employers coming within its limitations, and if a group is divided into classes, each class should be available to all employers within the group, who come within its limitations. To make an individual a group or class by himself, the Commission should be able to point to the peculiar hazard of the individual risk which justifies its separation as such.

If the Commission can justify any of its individual groupings upon the above basis, I can see no objection from the standpoint of its legality. If, however, the Commission find it necessary, upon the above basis, to place any such individual employer in a class within a group, the law seems to prevent the payment of a dividend to such an individual employer based solely upon his own experience and the cost of carrying his own insurance plus the amount credited to the surplus and reserve fund. There would seem to be no illegality, however, in the Commission fixing the original premium, and adjusting later

premium rates to accomplish the same result by basing the rate upon the peculiar hazard, to be determined in the first instance by each peculiar hazard, or protection against such hazard, namely, in accordance with the total payroll, the number of employees, safety appliances, system and so forth, and later to be determined upon such elements together with the average loss ratio experienced in connection with such individual risk.

It is, therefore, my opinion that the only way in which a single employer in the State fund can be separately grouped is where the nature of his business and the degree of risk of injury is such that he, in fact, represents a group by himself, subject, however, to the opportunity of other employers coming within its limitations to be made members of that group; and the only way in which a single employer in the State fund can secure a rate different from that allowed to other employers in such fund of the same group is through a system of schedule rating, as provided in the last sentence of section 25. But, for dividend purposes, even an employer so rated still remains in the group in which he is placed and dividends must be declared as the result of the total experience of the group of which he is a member for the premium period. *Opinion of Attorney-General, January 26, 1916.*

The Commission is now operating with a group arrangement not conflicting with the Attorney-General's ruling that establishes such groups outside of the six groups as "Special Road Builders Group, No. XI, effective July 1, 1916," and "Special Laundryman Group, No. XII, effective July 1, 1916."

*D. Cancellation of State Fund Policies.*—The State Industrial Commission's power to decide disputes relative to the cancellation of employers' contracts by private insurance carriers is elucidated by the rulings and correspondence under the general head, "Cancellation of Private Insurance Contracts," immediately following this title. The following opinion of the Attorney-General authorizes the Commission to cancel State Fund policies for non-payment of premiums:

I have been considering the question of cancellation of policies in State Fund for non-payment of premiums, together with the proposed ruling of your Commission providing for such cancellation.

The ruling which you propose to adopt is as follows:

In any case where an insurer in the state fund is in arrears in the payment of a premium and remains in arrears for — days after demand, the manager of the state fund may cancel said policy by a notice in writing, mailed to such insurer by registered mail, at his last known post office address, and fixing a period when such notice shall become effective, not less than ten days thereafter.

I do not find any provision in the statutes directly authorizing the cancellation of policies in the State Fund for non-payment of premiums, neither do I find any provision denying the right to cancel such policies, and it would seem to me under § 67 of the Compensation Law, that the Commission has power to adopt reasonable rules for the collection, maintenance and disbursement of



the State Insurance Fund and for carrying into effect the general provisions of the Compensation Law, and would have the power to pass such a rule unless by the terms of the policy a contract has been entered into, which cannot be violated by the State.

This leads to a consideration of the policy which has been issued by the State Insurance Fund. I find upon an examination of such policy, a provision for the automatic renewal which reads as follows:

The insurance under this policy shall automatically renew and continue in full force after the expiration of the original six months period for succeeding periods of six months, and the insured employer shall be liable for the renewal premium thereon for each such succeeding six months period, unless in compliance with the provisions of section 100 of the Workmen's Compensation Act, he shall have made other provision for securing the payment of compensation as required by subd. 2 or 3 of section 50 of the act.

This provision, standing alone, could be interpreted as precluding the State Industrial Commission from ever cancelling any of its policies notwithstanding the fact that no premiums were paid. It would seem to me to be contrary to public policy to so interpret that language as to provide for any such result if it is possible to reach any other conclusion as to the purpose and effect of such language. It would seem to be contrary to public policy to permit the State Industrial Commission to bind this trust fund placed in its charge in perpetuity to supply insurance to the insured employers in such fund, notwithstanding the fact that no renewal premiums were paid.

I believe that in interpreting this provision for automatic renewal, we should read the other provisions of the policy to see if we can get further light upon the meaning of that expression. I find that when the policy was first issued it was clearly provided that it should not take effect unless the advance premium of six months insurance had been paid to and received by the Commission. It is further provided, if any additional premium is found due upon a readjustment, that it is to be paid to the State Commission within 14 days after notice. I find that each renewal premium is payable within 14 days after notice of the rate and amount thereof, and I find that the following provision of § 53 of the Compensation Law is quoted and made a part of the policy:

Release from all liability. An employer securing the payment of compensation by contributing premiums to the state fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, etc.

It will be seen that release from liability was intended to depend upon the contribution of premiums. This is in the statute and is made a part of the policy.

It is clear from the above that it was intended as a material part of the contract that there should be a prompt payment of the premiums when due, and I believe that the provision with reference to automatic renewal can be interpreted as meaning that no new application was necessary at the end of each period of six months and that the policy should continue in force without any renewal of application, provided of course that there was compliance with the other provisions of the policy as to payment of the premiums.

As the policy is by its own terms to be construed by reference to the Compensation Law and as the Compensation Law clearly gives the power to the Commission to make reasonable rules, not inconsistent with the statute, for the purpose of carrying out the details of its provisions, I believe that it is within the power of the Commission to make the rule proposed with reference to the cancellation of policies, where there has been a failure to pay the premiums. *Letter of Attorney-General, February 11, 1916.*

## CANCELLATION OF PRIVATE INSURANCE CONTRACTS

(Workmen's Compensation Law, § 20, § 54, subd. 5)

Relative to insurance contracts and the Commission's power to decide disputes between employer and insurance carrier, sections 20 and 54 of the Workmen's Compensation Law are to be read together. The Commission may determine whether a policy of insurance has been cancelled or not. The Attorney-General has so held relative to *Bloom v. Tilin and Bleek* in a letter replying under date of August 16, 1915, to inquiries of the Counsel of the State Industrial Commission. Workmen's Compensation Law, § 20, declares: "The commission shall have full power and authority to determine all questions in relation to payment of claims presented to it for compensation under the provisions of this chapter." Workmen's Compensation Law, § 54, subd. 5, provides that no contract of insurance shall be cancelled until at least ten days after notice of cancellation shall be filed in the office of the Commission. Through Commissioner Lyon the Commission asserted its authority in *Bloom v. Tilin and Bleek* and decided the issue: S. R. D., vol. 5, p. 441, November 13, 1915. The Commission's powers were again challenged in *Miner v. Turnbull*, S. D. R., vol. 7, p. 474, March 7, 1916. In this ruling Commissioner Lyon said:

The insurance carrier attempts to raise the question of this Commission's jurisdiction to pass upon the question at all. The claim made by the company would seem to resolve itself into the proposition that if the insurance company denies that it is an insurer, the Commission is ousted of all jurisdiction and that practically every case coming before the Commission could thus be taken out of the Commission's hand and transferred to a court of law or equity. Thus the insurance carrier says in its brief:

The statute makes specific provision for penalties which the employer shall suffer, if he is not insured, and the only question which the Commission may consider is whether the employer can prove that he has a policy of insurance and if not, then to dispose of penalties prescribed by law.

This would seem to put the Commission in this anomalous position: When the insurance carrier claims that the policy is not binding an award can only be made against the employer. The Commission may then sue the employer to recover the penalties putting itself on record as acquiescing in the insurance carrier's position and leave the question whether the employee is protected by insurance to be tried out in a court of law where neither the

employee nor the insurance company is represented. If this be the legal situation then the compensation act, instead of being one which insures payment to an injured employee without legal proceeding and without expense to him, would seem to be entirely defeated and every compensation case might be turned into a law suit. It seems to me that this is contrary to the whole spirit of the Compensation Law. Moreover, in my opinion, it is specifically contrary to the provisions of subdivision 1 of section 54 of the act, which is as follows:

Section 54. The Insurance Contract.—1. Right of recourse to the insurance carrier. Every policy of insurance covering the liability of the employer for compensation issued by a stock company or by a mutual association authorized to transact workmen's compensation insurance in this State shall contain a provision setting forth the right of the commission to enforce in the name of the people of the State of New York for the benefit of the person entitled to the compensation insured by the policy either by filing a separate application or by making the insurance carrier a party to the original application, the liability of the insurance carrier in whole or in part for the payment of such compensation; provided, however, that payment in whole or in part of such compensation by either the employer or the insurance carrier shall to the extent thereof be a bar to the recovery against the other of the amount so paid.

The provision of the Compensation act for a review of this Commission's rulings would seem to give the insurance carrier sufficient protection against improper awards.

The claim of the insurance carrier therefore that the Commission has not jurisdiction is overruled.

The above mentioned disputes between employer and insurer, together with *Skoczlois v. Vinocur*, S. R. D., vol. 7, p. 443, involve questions of wrong address, non-registration and non-receipt of notice, non-payment of premium, etc. The complexities of a question of cancellation are illustrated by the Commission's ruling in the joint cases of *McCaffrey v. Tager Contracting Co.* and *Gibbons v. Tager Contracting Co.* The ruling is as follows:

LYON, Commissioner.—These two cases were heard together and involve the same question, namely, whether the policy of insurance issued to the employer on July 25, 1914, and running to July 25, 1915, was properly cancelled by a notice mailed on October 1, 1914, to become effective on October 10th. The only difference in the cases is that the accident in the *McCaffrey* case occurred on June 15, 1915, and in the *Gibbons* case on July 19, 1915.

One, Oppenheim, an insurance broker, but not the agent of the Fidelity and Deposit Company of Maryland, secured from the Tager Contracting Company the data for the policy in question and gave the information to Brinkerhoff Jordan Company who are the agents of the Fidelity and Deposit Company. Oppenheim testified that he knew perfectly well the address of the Tager Contracting Company was 243 West Forty-sixth street and when he gave Brinkerhoff Jordan Company the data for writing the policy, he gave that as the Tager Contracting Company's address. However, when the policy came to be written the address of the Tager Company, instead of being given as 243 West Forty-sixth street, was written into the policy as 245 West Forty-fifth street, and this error in the address seems not to have been discovered by any one.

On September 1, 1914, a check for fifty dollars, a part of the premium on policy, drawn in favor of Brinkerhoff Jordan Company was delivered by the Tager Contracting Company to Oppenheim, went through the bank and was returned cancelled, the same being indorsed "deposit to credit of Brinkerhoff Jordan Company." On October third another check was given by the Tager Contracting Company to L. Oppenheim covering the balance of the premium. This check was indorsed by L. Oppenheim and returned as paid. For some reason or other, Brinkerhoff Jordan Company, who are the agents of the insurance carrier, did not forward the money so received to the insurance carrier. This was accounted for by the fact that Brinkerhoff Jordan Company usually received at the end of each month, a statement from the insurance company showing what moneys the agent had collected for the company and Brinkerhoff Jordan Company would then remit to the company. The insurance company not having received the money by the last of September had decided to cancel the policy, and therefore, did not include this unpaid premium in the statement rendered on or about October first to Brinkerhoff Jordan Company. The insurance carrier supposing the premium had not been paid sent a written notice of cancellation to the Tager Contracting Company dated October first and to become effective on October tenth, but this letter being directed to 245 West Forty-fifth street, address named in the policy, did not reach the Tager Contracting Company whose address was 243 West Forty-sixth street. The insurance carrier knew that this letter did not reach the insured, but no further effort to secure the insured's correct post office address was made. In the cancellation notice sent, the insurance carrier, instead of offering to return any portion of the premium, stated that inasmuch as nothing had been paid on the premium no adjustment was to be made.

After the accident to McCaffrey and on July twelfth, the insurance carrier who had never received any of the money from Brinkerhoff Jordan Company, directed them to return the premium to the Tager Contracting Company, and a letter containing a check was, on or about that date, mailed to Oppenheim, the broker, but Oppenheim testified that he never received it and the check never in fact came back through the bank as paid.

We have then a case where a party received a policy of insurance properly issued, pays the premium to the recognized agent of the insurance company, receives no notice of any intention to cancel, the notice of cancellation making no reference to his right to receive back any of the premium money, the wrong address in the policy being due to the failure of the insurance company's agent to properly take down the address given by the broker and no attempt made when the cancellation notice came back to secure the insured's proper address. In my opinion the insurance carrier has not shown that the policy was legally cancelled. I do not think the notice of cancellation was sufficient under the statute even if it had been received by the Tager Contracting Company, for two reasons:

*First.* Because the period when it was to become effective was not ten days after the date when it was mailed. Subdivision 5 of section 54 of the Compensation Law provides as follows: "No contract of insurance issued by a stock company or mutual association against liabilities arising under this chapter shall be cancelled within the time limited in such contract for its expiration until at least ten days after notice of intention to cancel such

contract, on a date specified in such notice, shall be filed in the office of the commission and also served on the employer.”\*

Section 20 of the General Construction Law provides: “A number of days specified as a period from a certain date within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made.”

It seems to me very clear that under these two statutes a notice on the first of the month to be effective on the tenth is not sufficient notice.

*Second.* It seems to be conceded by the carrier that to make a cancellation notice effective either the unearned portion of the premium must be returned or an offer to return made. In the present case no offer to return was made and the fact that it was not made is due to the fault of either the insurance carrier or its agent, for the agent certainly had the premium, or a substantial part of it, and the mistake made in not turning it over to the company is certainly not to be used against the Tager Contracting Company. It is probably true that the proper mailing of the notice of cancellation would be sufficient to cancel the policy, whether it was received through the post office or not. In this case, however, the notice was not mailed to the correct address and the fact that the wrong address was in the policy is, on the evidence, at least as much the fault of the company as of the insured. It is probably the duty of a person insured under a policy to look it through and find whether there are any errors in it, but it may be doubted whether this is any more incumbent upon the insured than it is the duty upon the insurer of putting the correct address in when it is given him as Oppenheim testified was done in the present case. Furthermore, I think it was the duty of the insurance company when they were apprised of the fact that their cancellation notice had not been received by the insured, to make some effort to find his proper address and give him the cancellation notice.

In my opinion compensation must be granted in both cases.

In the foregoing opinion, award made in both cases, November 4, 1915. All concur except Mitchell, Commissioner, not voting. *McCaffrey v. Tager Contracting Co.* and *Gibbons v. Tager Contracting Co.*, S. D. R., vol. 5, p. 434, November 13, 1915.†

The correspondence between the Attorney-General and the Counsel of the Commission referred to in *Bloom v. Tilin & Bleek* is as follows. The Attorney-General held that the Commission has power to determine the facts in a dispute relative to cancellation, and to award compensation directly against the insurance carrier and to bring suit for its recovery:

1 Madison Ave., New York City, August 13, 1915.

*Claim 74180; Emil T. Bloom, deceased.*

HON. E. E. WOODBURY, Attorney-General, Capitol, Albany, N. Y.:

DEAR SIR.—Your opinion is respectfully requested upon certain questions which have arisen before the State Industrial Commission, in relation to the determination of the claim for compensation made on behalf of the wife and

\* The subdivision has been amended by L. 1916, ch. 622.

† The award in the *Gibbons* case was affirmed by the Appellate Division, June 30, 1916, without opinion.

children of the deceased employee above named. The facts, so far as material to the question at issue, are as follows:

Emil T. Bloom was employed by the firm of Tillin & Bleek, which firm, prior to the date of the accident, had given security for the payment of compensation by insuring with the Aetna Life Insurance Company. He was injured on March 24, 1915, and died on March 28, 1915. In passing upon the claim for compensation notice of hearing was sent to the employer and also to the insurance carrier. Upon the hearing the insurance carrier contended that the policy in question had been cancelled for non-payment of the premium. The employer contended that the premium had been paid and that notice of cancellation had never been received.

Has the State Industrial Commission jurisdiction to determine whether the policy above mentioned has been cancelled?

Has the State Industrial Commission jurisdiction to make an award of compensation directly against the insurance carrier, as well as against the employer?

In what manner should the State Industrial Commission pursue its right of recourse against the insurance carrier under subdivision 1 of section 54 of the Workmen's Compensation Law?

The Commission is frequently confronted with questions somewhat similar to the above, where the insurance carrier contends that its policy is not operative as to the accident in question, and the Commission would be glad to have your opinion upon the question above mentioned and any other views which you may care to give, indicating in what manner the rights, as between the injured workman, his employer and the insurance carrier may be definitely determined.

If you desire, the writer will be glad to talk the matter over with you.

Very respectfully,

STATE INDUSTRIAL COMMISSION,  
JEREMIAH F. CONNOR, *Counsel*.

August 16, 1915.

*Claim 74190; Emil T. Bloom, deceased.*

HON. J. F. CONNOR, *Counsel, State Industrial Commission, 1 Madison Avenue, New York City:*

DEAR SIR.—In reply to your letter of the 13th instant and in reply to the questions therein set forth, would say that in my opinion the State Industrial Commission has jurisdiction to determine whether the policy has been cancelled inasmuch as it is provided under section 20 that "the Commission shall have full power and authority to determine all questions in relation to payment of claims for compensation under the provisions of this chapter", and also, it is provided under subdivision 5 of section 54 that "no contract of insurance shall be cancelled until at least ten days' notice of intention to cancel such contract shall be filed in the office of the Commission", and from your letter I do not glean that any such notice had been filed in your office.

As to the second question, I think the State Industrial Commission has jurisdiction to make the award directly against the insurance carrier under subdivision 1 of section 54, as I assume that the policy in question had the clause therein stated of the right of the Commission to enforce the policy.

As to the third question, I think the State Industrial Commission after making the award, if it is not paid, can bring suit to recover the same with the penalty as provided in section 26.

Very truly yours,

E. E. WOODBURY,  
*Attorney-General.*

Amendments of Workmen's Compensation Law, § 54, subd. 5, effected by L. 1916, ch. 622, apply the requirement of notice to the Commission and the employer to insurance carriers instead of to stock companies or mutual associations and make such notice a notice, not of intention to cancel, but of actual cancellation. They also add a proviso that "the right of cancellation of a policy of insurance in the state fund shall be exercised only for non-payment of premiums."

## PROCEDURE AND EVIDENCE

(Workmen's Compensation Law, §§ 23, 67, 68)

A. *New rules requisite.*— The rules of procedure in workmen's compensation cases must grow out of the nature and purposes of the Workmen's Compensation Law. The simple workmen's compensation plan having been adopted as a relief from the intricate and uncertain employers' liability system, the technical rules that have grown up around the employers' liability system must depart with it and new rules must develop that will harmonize with the compensation concept. In recognition of this necessity, the Workmen's Compensation Law gives the State Industrial Commission rule-making powers relative to notices, evidence, hearings, etc., emancipates it from "common law or statutory rules of evidence" and "technical or formal rules of procedure" and provides that appeals from its decisions shall be summarily heard in the courts. The Appellate Division set forth and applied this principle in its reversal of a decision of the State Industrial Commission which denied compensation to an employee on the ground that he was an independent contractor. The court declared:

The Workmen's Compensation Law must in fairness be deemed to have been enacted in furtherance of a legislative determination, enforced by explicit mandate of the people through amendment of the State Constitution (Art. 1, § 19), that a new and different scheme and basis of indemnity for industrial accidents should be adopted in this State, in the light of the social experience of other commonwealths and countries. Injuries sustained by those who perform the manual and mechanical tasks of an industry must be deemed to have been intended by this statute to be made a social risk, a liability of the industry, a charge upon the production cost of the article manufactured or the service rendered. Hitherto the rule of our statute and fundamental law had been that any right of recovery for industrial accidents must arise from a breach of the master's duty as to care and safeguards, and accordingly was limited by whatever contractual relation existed between the person injured and the person whose breach of duty was the efficient cause of injury. For this historic concept of liability springing from omission of legal duty created by contractual relation there has been substituted an application of the social principle that, regardless of duty and regardless of fault, the expenses and loss of earnings resultant from occupational injury to a workman engaged in carrying on an inherently hazardous business or avocation of an employer should be paid in the first instance by the employer and by him made a charge against the operating costs of the business. In place of the traditional



juristic rule that the master must respond in damages when his servant is injured through the master's fault, and that otherwise the servant must go uncompensated and the loss be borne by him alone, the people and Legislature have now put in force the changed concept that the *trade product* should be charged with all consequences of inherent trade hazards, and that losses to individual workers through disability while engaged in the service of the proprietor of the business should be distributed among all its consumers or patrons, rather than left to operate ruinously against the disabled employee or the solitary employer. This mandate of the fundamental will of the people of this State should be remedially applied and beneficially enforced by the State Workmen's Compensation Commission and by the courts, in fair fulfillment of the legislative purpose, and ought not now to be hampered or crippled by continued application of definitions, concepts and rules of liability which indubitably produced in large part the very conditions of hardship for which the present statute was designed as comprehensive relief. *Rheinwald v. Builders' Brick and Supply Co.*, 168 App. Div. 425, May 14, 1915.

*B. Right to cross-examine.*—The Appellate Division reversed and remanded an award where the insurance carrier had been denied an opportunity to cross-examine the claimant: *Ramsey v. Fairbanks-Morse & Co.*, 171 App. Div. 959, November, 1915.\*

*C. Court procedure simple and expeditious.*—The Appellate Division further recognized the new order as applicable to appeals and to the procedure of workmen's compensation cases in the courts as well as in the Commission. It denied the necessity of filing exceptions or of stating the grounds of appeal in the notice. The Court said:

There is no provision of the statute or rule of this court requiring the filing of exceptions, or, as in England and in some of the States, that the grounds of appeal be stated in the notice of appeal; but it was intended that the procedure both before the Commission and in this court should be simple and without unnecessary delay or useless formality; and that until otherwise provided, the appeal to this court should bring up the whole case, to be heard upon the record of the Commission and the briefs and arguments submitted by the respective parties. *Kenny v. Union Railway Co.*, 166 App. Div. 497, Mar. 3, 1915.

But the most noteworthy instance of the court's recognition and interpretation of the new methods has to do with the subjects of court review and evidence. Section 20 of the Workmen's Com-

\* Connor's "Employers' Liability, Workmen's Compensation and Liability Insurance," p. 133.

pensation Law makes the State Industrial Commission's decisions "final as to all questions of fact." Section 67 empowers the Commission to make its own rules of evidence and procedure, provided only that they shall be reasonable and shall be consistent with the Workmen's Compensation Law. Section 68 declares that the Commission's investigations, inquiries or hearings "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure."

*D. Courts precluded from review of evidence.*—In a case decided May 5, 1915, the appellant employer argued "that there was no evidence sustaining the award and that therefore there was an error of law" but the Appellate Division unanimously affirmed the award upon the ground that the employer had had fair treatment in the matter of evidence and that it was precluded by Section 20 of the Workmen's Compensation Law from considering the Commission's decision further. The opinion was as follows:

KELLOGG, J.: The Commission finds as a matter of fact that the claimant was disabled for the time allowed. The only question raised by appellants is that the evidence does not sustain that finding.

The claimant was injured July 8, 1914, and the Commission, October nineteenth, awarded him compensation for three weeks at seven dollars and sixty-nine cents a week, the total allowance being twenty-three dollars and seven cents, the employment falling under group 21 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). On November 2, 1914, the matter again came before the Commission and an award was made of eleven additional weeks at the same rate per week from August 12, 1914, to October 27, 1914.

Upon the first hearing the evidence of the physicians indicated that he was not injured as much as he thought he was. After the award he returned to the foundry and, entering the dark room, as he claims, was unable to see; there seemed a smoke over his eye to such an extent that he could not work. He appeared personally before the Commission. The appellants claim that the evidence of the physicians upon the first hearing showed clearly that the injury was only temporary, and that his story upon the second hearing was not true. That was a question of fact for the Commission to determine. Section 20 of the act declares that the decision of the Commission shall be final upon all questions of fact. The appellants now contend that there was no evidence sustaining the award, and that, therefore, there was an error of law. But the claimant was before the Commission, was examined personally and gave his testimony. It was justified in the award if it believed him. The evidence against him was that of the two experts upon the former hearing. The Commission considered that the claimant was not unworthy of belief, and that he, better than any one, knew his condition. It does not appear that the appellants offered any evidence which was excluded.

They were represented by counsel, and if they desired to put in further evidence should have asked or demanded that right. The decision stands as one of fact. We are precluded from considering it further. If, however, we were at liberty to review the question of fact we could not say that the decision is against the evidence. The award is, therefore, affirmed. All concurred. Award affirmed. *Goldstein v. Centre Iron Works*, 167 App. Div. 528, May 5, 1915.

The Appellate Division unanimously refused without opinion to disturb an award based upon conflicting evidence where the death of the employee had been caused by a fall, an electric shock or natural causes: *Broleski v. Nichols Copper Co.*, 171 App. Div. 959, November, 1915.\*

E. *Hearsay*.—Basing its decision upon the above-cited sections of the Workmen's Compensation Law, the Appellate Division in *Carroll v. Knickerbocker Ice Co.* six months later declared itself powerless to criticise or revoke an award of the Workmen's Compensation Commission based upon testimony the great bulk of which "was hearsay, and, in some instances hearsay upon hearsay." The court was divided. The opinion of the majority was as follows:

HOWARD, J.: The decedent was a driver on an ice wagon owned and operated by the Knickerbocker Ice Company. While putting in ice at a cafe on Forty-second street in New York city the decedent, according to the findings of the Commission, was injured by reason of his ice tongs slipping, which caused a cake of ice to come back and strike him in the abdomen. Nobody saw the accident and nobody attempts to testify directly as to the cause of the accident. On the occasion in question the deceased vomited what appeared to be blood; whether the vomiting was before or after the alleged accident is not certain. The cake of ice which the decedent was handling weighed 300 pounds, and he, with the assistance of two other persons, lifted it four feet and put it in the ice box. The decedent drank a glass of whisky on the occasion; he and his helper also had a bottle of stout. The decedent went home and was taken sick, and shortly afterwards was taken to a hospital, where he died four days afterwards. He stated to his wife and also to the doctors and to Mary Murphy that his tongs had slipped and the ice had come back on him, hitting him in the abdomen. At the hospital he developed delirium tremens. The proof of death made by the attending physicians gives as the remote cause that "300 pounds of ice struck his epigastrina causing gastric hemorrhage—Rigidity in upper abdomen \* \* \*." The immediate cause is given as "Œdema of the lungs, Delirium Tremens." The deceased was a hard drinker and had been such for twenty-five years.

If we were to look at this case as we would look at an action in court, or if we were to adhere to the substantive law of evidence, it is entirely clear

\* Connor's "Employers' Liability, Workmen's Compensation and Liability Insurance," p. 138.

that the award should be instantly revoked. The proof offered was of such a character that no court would have hesitated a moment to reject it. All the rules of evidence, the accumulation of centuries of experience and wisdom, were ignored by the Commission. But was the Commission not authorized to ignore them? Indeed, in order to keep step with the spirit of the law, was the Commission not bound to ignore them?

It is clearly evident that the great bulk of the testimony in this case was hearsay, and in some instances hearsay upon hearsay. There is slight evidence that the deceased vomited blood, and some evidence from which it might be inferred that he strained himself by lifting on the ice. From these two slender items of evidence the Commission might have inferred that the injury arose from the accident. Everything else is wholly hearsay. The doctor's certificate that the remote cause of death was because 300 pounds of ice hit the deceased, is, of course, only hearsay. So that the question arises here whether the Commission, under section 68 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), were authorized to receive the hearsay evidence and base their findings upon it. Section 68 reads as follows: "Technical rules of evidence or procedure not required. The Commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties." Subdivision 2 of section 67 also provides that the commission shall adopt rules providing the "nature" of the evidence to be accepted by it.

As to proceedings before the Commission, these two sections wholly abrogate the substantive law of evidence — abrogate the common law, the statute law, the rules of procedure formulated by the courts, and all the technicalities respected by the legal profession. The Commission is authorized by this section, it seems, to make its investigation in any manner that it chooses, wholly unfettered by any law previously invented by man. This is the spirit of the statute. The Commission is to be bound neither by custom nor by precedent. The trials before the Commission are to be summary, speedy and informal. The very instant that the old rules of evidence are invoked the informal character of the hearing disappears and the rigid, formal rules of procedure and all the technicalities incident to the practice of the law will grow up around the commission, hampering and delaying it, working inconvenience and hardship upon the claimants, and defeating the intent of the law.

Assuming then that the Commission had the right to receive the hearsay evidence which it did receive and act upon it (and if it had a right to receive it, it had a right to act upon it), its decision on the questions of fact was final and is beyond our power to criticize or revoke. (Workmen's Compensation Law, § 20. See, also, Laws of 1915, chap. 167, amdg. said § 20.) The award of the Commission should be affirmed.

All concurred, except Lyon and Woodward, JJ., who dissented, the latter in opinion. *Carroll v. Knickerbocker Ice Co.*, 169 App. Div. 450, Sept. 15, 1915.

In his dissenting opinion, Justice Woodward, reviewing at length the circumstances and conduct of the case, denied that there was any proof at all to justify the Commission's award. For this reason the court, he declared, had "the right and duty to review." "There must be in the record," he said, "*some evidence of a sound, competent and recognizedly probative character to sustain the findings and award made, else the findings and award must in fairness be set aside by this court.*" His opinion was as follows:

WOODWARD, J. (dissenting: The award appealed from should be reversed, and the proceeding remanded to the State Workmen's Compensation Commission for the taking of further testimony, if available. The record at bar does not contain evidence which can be accepted as sufficient or as *any* proof upon matters essential to the right of the claimant to receive compensation under the statute. Findings which state conditions precedent to any validity of the award stand in the present record without evidence fairly tending to support them. Under such circumstances, this court has no right to sanction the payment of money to the claimant pursuant to the award, for thereby would be imposed upon the patrons of the decedent's employer and upon the community as a whole a considerable burden and expense which the statute did not contemplate and the fundamental spirit of our law forbids.

In the proceeding at bar the Compensation Commission seems to have acted under a certain misapprehension of its powers, functions and permissible procedure in passing upon the right of a claimant to the protection provided by the statute. This misapprehension is altogether explicable under the statute and is in no wise discreditable to the Commission's sincerity of purpose and integrity of action, yet the consequences are such as to require reversal of the resultant award. As the issues here raised are of novel impression yet of vital importance to the daily work of the Compensation Commission and its successors, it seems proper to state in some detail the opinion of this court thereon, in so far as the matter is presented by the award under review.

The Workmen's Compensation Law does not undertake to provide a system of indemnity for the widows and children of all workers who die during the period of their employment in one of the enumerated trades. Any right of the widow or dependent children to claim compensation for being deprived of the decedent's earnings and thus assess their loss against the cost of the employer's product or service to the community, must be predicated on the determination that the earnings were cut off by "disability or death \* \* \* *resulting from an accidental personal injury* \* \* \* arising out of and in the course of his employment." (Consol. Laws, chap. 67 [Laws of 1914; chap. 41], § 10.) Precedent, therefore, to the Commission's right to make an award in allowance of any claim, must be the production of *proof* (1) that the worker sustained a known and determinable accident or mishap in the course of his employment; (2) that this accident or mishap arose out of his employment; (3) that this accident or mishap caused the worker injury to his person; and (4) that the injury caused disability or death, and thereby

terminated the support of widow or children from the earnings of the employment. In the absence of fair and acceptable proof of these vital elements, the Commission has no power, and could be vested with no power under our Constitution and laws, to award reimbursement ultimately assessed upon society as a whole, any more than the Commission or a court, prior to the statute, would have had power, without such proof, to exact such indemnity from the individual employer whose legal fault caused the injury. The change in the fundamental spirit and purpose of our statutes governing indemnity for industrial accidents (*Matter of Rheinwald v. Builders' Brick & Supply Co.*, 168 App. Div. 425) has in no wise waived or lessened the necessity for actual proof of the accident, its relation to the employment, the resultant injury, and the consequences of that injury.

The record at bar I scan in vain for anything which can be called demonstration or proof, anything which ought fairly and reasonably to convince an ordered mind, as to the presence of these essential elements in the events leading up to the death of the claimant's husband. The Commission's decision and award hinges upon a finding of fact that on September 22, 1914, while Myles Carroll, the deceased, was in the employ of the Knickerbocker Ice Company as a driver on a wagon for the delivery of ice, "the ice tongs slipped" as he was "putting ice in the cellar of a saloon at 20 East 42nd street, Borough of Manhattan, City of New York," and "a 300-lb. cake of ice fell upon him, striking him in the abdomen, causing an epigastric hemorrhage, and a rigidity of the abdomen." On the following day he was sent to the Bellevue Hospital, where he was found to be suffering from delirium tremens. On September twenty-eighth he died at the hospital, and the immediate cause of death was stated to be "œdema of the lungs—delirium tremens." The Commission found as a matter of fact that "the primary and predominating cause of death was the injury to the abdomen, and the delirium tremens was a contributory cause in decreasing the resisting power of the individual." The Commission formally found that these injuries "resulted in his death;" that they were "accidental," and that they "arose out of and in the course of his employment." I have read the record with care and fail to find therein, upon the points enumerated below, anything which can be called evidence sustaining the finding and warranting judicial sanction of the transfer of funds from the treasury of the self-insuring employer to the pockets of the claimant and her children. There is literally no *proof* that the deceased sustained an "accident" while carrying ice; no *proof* that his "ice tongs slipped;" no *proof* that a cake of ice weighing 300 pounds, or any cake at all, fell upon him; no *proof* that he was struck in the abdomen on that day; no *proof* that any "accident" happened in the course of his employment which caused "an epigastric hemorrhage and a rigidity of the abdomen." There is little that can be called convincing demonstration that the sole cause of death was not delirium tremens and attendant manifestations, or that "injury" at any time had anything to do with Carroll's death in the alcoholic ward of Bellevue Hospital six days after the alleged misadventure with the ice tongs, but it can hardly be said that the Commission's findings that death was not principally and solely due to excessive use of alcohol was without evidence tending to sustain it.

It is not necessary to review in detail the record of the proceedings before the Commission or to analyze the supposed "evidence" upon which the

findings of fact are based. It is not asserted here, in behalf of the claimant or the Commission, that there is actually in the record any "evidence" sufficient to sustain these essential findings of fact, if the proceedings had and the proof taken be subjected to the scrutiny which is required by common-law and statutory standards of evidentiary demonstration. It is not claimed that there was adduced before the Commission "evidence" which would stand the test of analysis in the light of any rules of proof hitherto known in any proceeding judicial or quasi-judicial. The position is rather that the Commission acts administratively rather than judicially; that it has been expressly emancipated from the requirements of common-law and statutory rules of evidence and procedure; that its findings of fact have been explicitly made final and conclusive, beyond the power of this court to review; that the record made before the Commission was such as to convince its members in good faith that the claimant came within the purview of the statutory protection; and that the Commission's findings and award may be questioned here only upon showing of bad faith or entire disregard for due forms of procedure.

An instance or two will sufficiently illustrate the "evidence" upon which the Commission based its findings. For example, as to the falling of ice upon the decedent's abdomen. No witness was produced who saw any ice fall, any tongs slip, any accident or mishap, or any clear evidence of injury sustained at the time claimed. The half dozen or more witnesses who testified that they were on the scene, saw no accident, no fall of ice. Dr. Bancroft, the attending physician, testified that the deceased told him that a piece of ice fell and hit him, causing pains in the abdomen. The wife of the deceased testified to a somewhat more circumstantial story of the fall of the ice, which she said he told her. One Mary Murphy, a visitor in the decedent's household, told a similar story of what she said the deceased had told her. Dr. Weeks, of the Presbyterian Hospital, to which Carroll went before transfer to Bellevue, testified that Carroll told him a piece of ice fell on him, but Dr. Weeks could find no indications of injury in the region of the stomach. Dr. Connelly, of the Bellevue alcoholic ward, found no bruises or abrasions, and no indications of any abdominal injury. Fucillo, Carroll's helper on the wagon, who made the "eye-witness" affidavit of the injury, testified that he saw no accident and heard of none, and that when the affidavit was presented to him which said that ice fell on the deceased, he crossed that part out before signing and told the claimant's representative that Carroll had not been injured. The testimony of the various physicians by no means established that Carroll's condition when examined was explicable only on the assumption that he had received an injury from the fall of a heavy cake of ice; the reported conditions leave it at least doubtful whether any accident or injury bore any causal relation to his death. So on the question of the slipping of the tongs, the fall of a 300-pound cake of ice, the pressure of such a cake on the decedent's chest or abdomen, and the development of any consequences therefrom, the only "evidence" offered was "hearsay" versions of self-serving declarations made by Carroll. In some instances we have a "hearsay" version of statements which in turn were purely "hearsay." No witness who was called to the stand gave testimony indicating that such an accident happened; the only testimony on that score was that of persons who were not there but say the decedent afterwards *said* his condition was due to such an accident, and persons who were there at the time but saw and knew nothing of any accident.

The claimant and the Commission assert that the "evidence" is sufficient to sustain the findings. They say that it reasonably convinced them that there was an accident and consequent injuries causing death, and that no other or further proof was requisite, even though the Commission did not *see* or *examine*, and counsel for the insurer had no opportunity to *confront* and *cross-examine* any persons who stated that ice fell upon the decedent, that he sustained any mishap whatever, nor was any statement made *under oath* that any such thing took place.

It is, of course, true that the State Workmen's Compensation Commission was primarily an administrative rather than a judicial body and was entitled, in most respects, to act in the manner usual in the conduct of administrative officers, without obligation to follow the more formal requirements of judicial procedure. In determining, however, a claim for compensation under the statute, the Commission was charged with a duty of ascertaining and recording facts and making inferences and conclusions therefrom, and was charged with a power to award payment of moneys from one person to another, according as such facts might be found and conclusions reached. By centuries of traditional law, such duties, powers and functions have come to be regarded as judicial in their nature, even though intrusted to administrative officers or boards, and by a long line of precedents, fairly paralleling the history of the development of property rights under the law, it has come to be recognized that these duties, powers and functions may not be performed by any officer or board except in conformance to long-revered standards as to what is fundamentally fair, sound and right in such procedure. Even though the Workmen's Compensation Law (§ 20, as amd. by Laws of 1915, chap. 167) made "final" the findings of the Commission upon all questions of fact, the question whether a finding of fact by such a body is without evidence tending to support it is a question which this court has the right and duty to review. And as was said by this court in the *Rheinwald Case* (*supra*): "In all cases the question of the correctness of the Commission's determination as to the applicability of the statute to the injury upon which the claim is based remains a question for judicial scrutiny, in the light of the facts as found by the Commission."

The Commission claims that there *was evidence* upon the vital issues; that the sworn narrative of persons who heard the unsworn statements of the deceased as to what befell him was *evidence* which the Commission, in its discretion, was entitled to accept and hold sufficient, even though it all would have been rejected in a court of law. As authority for this view, attention is directed to section 68 of the Workmen's Compensation Law:

"§ 68. Technical rules of evidence or procedure not required. The Commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties." (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 68).

This section, obviously designed to promote informality and directness and eliminate technicality in procedure, cannot be construed to warrant the Commission to make a finding and award *without legal evidence to sustain it*.



The Commission was of course entitled, in all its hearings relative to claims, to go to the very right of the matters at issue, and summarily search out the full facts concerning them. It would be a misfortune were the inquiry of such a board narrowly constrained by harassing formalities of procedure or insubstantial technicalities as to the admissibility of proffered proof. Both the letter and the spirit of this salutary statute exclude the idea of technicality in its administration or fettering constraints on the Commission's purpose to glean all the facts and do substantial justice under the law. Accordingly, the Commission had the right and power, in its untrammelled discretion, to receive and admit proffered proof freely and liberally with a view to developing all the facts. It might take any evidence, oral or documentary, which impressed its members as perhaps tending to disclose to them the whole situation as to matters in dispute. If in the exercise of this discretion part of the testimony taken proves to be "hearsay," or part of it is "not connected," or lacks probative force, or offends against some other rule of evidence, no one may be heard to complain. Section 68 empowered the Commission to proceed freely and earnestly in search for all facts throwing light on the vital issues; it does not proceed in any peril of fatal error through failure to draw closely the evidentiary rules obtaining in courts of law.

But after the Commission has gathered all this data, all this information unfettered by "technical rules of evidence," then must come sifting and sorting; then must come assortment of wheat from chaff, demonstration from gossip, proof from "hearsay," and then the ascertainment of what facts have been *fairly proved* under "the maxims which the sagacity and experience of ages have established as the best means of discriminating truth from error." (1 Bouvier's Law Dictionary [Rawle's Rev.], 702.) No matter what proffered testimony has been *taken*, no matter how extraneous and immaterial many portions of the record ultimately appear, it is the residuum of legal evidence which must be decisive. There must be in the record *some evidence* of a sound, competent and recognizedly probative character to sustain the findings and award made, else the findings and award must in fairness be set aside by this court.

Section 68 of the act, then, cannot be given any force as emancipating the Commission from all legal restraints as to the presence of duly proved facts as essential bases for findings. Section 68 enunciates no rule as to the *probative force* of testimony at all. It sanctions no departure from the traditional basis on which money or property may be awarded under legal mandate. Its scope and purpose is procedural merely; it frees the Commission, in its hearings, from the haunting fear of reversible error through failure to hold the proof to technical legal requirements, both as to evidence received and evidence rejected. In other words, it does little, if any, more than to write into the procedure of this Commission and into the powers of the courts in review of awards the wholesome standard embodied by Mr. Justice STEPHEN in his Indian Evidence Act of 1872 (§ 167), which has lately been so cordially praised by Mr. Charles Frederic Chamberlayne in section 319 of his "Treatise on the Modern Law of Evidence," as embodying "the correct administrative principle" for dealing with claimed errors in evidentiary rulings: "The *improper admission or rejection* of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the court before which such objection is raised that, *independently* of the evidence

objected to and admitted, there was *sufficient evidence to justify the decision*, or that, if the rejected evidence had been received, it ought not to have varied the decision."

The Commission, then, was given large immunity from fear of errors in rulings upon evidence, large freedom in admitting any testimony which seemed at the time to promise to become of aid in the final determination. Any finding and award, however, must rest securely in the presence, after the sifting-out process is completed, of sufficient legal evidence to sustain them. Otherwise they must fall.

In the case at bar I conclude that the Compensation Commission was within its discretion in receiving the testimony which it did. Its findings and award must, however, fall, because *all* the "evidence" received upon the vital issues was of a sort unsanctioned in law and lacking in probative force in any tribunal performing a judicial function. The absence of a residuum of legal proof is fatal.

For these reasons the proceeding should go back to the successor of the Compensation Commission for ascertainment whether effectual proof cannot be found.

Award affirmed. *Carroll v. Knickerbocker Ice Co.*, 169 App. Div. 453, Sept. 15, 1915.

In a later case presenting interesting points from the standpoint of evidence, Commissioner Edward Lyon of the State Industrial Commission says of the opinion in the Carroll case:

Under the ruling of the Appellate Division, in the case of Carroll against the Knickerbocker Ice Company, it would be perfectly proper for the Commission, if it thought the weight of the hearsay evidence efficient, to grant compensation on this evidence alone, but if it were the only evidence in the case I should personally hesitate very seriously before doing so. I do not understand that the opinion of the Appellate Division goes any farther than to make it possible for this Commission in carefully weighing evidence to make a finding upon hearsay evidence alone. I do not understand that the Appellate Division has in any way intimated that this Commission should make such a finding on such evidence, unless it is convinced by the weight of the evidence of its truth. *Stadtmuller v. Ehret*, S. D. R., vol. 6, p. 342, November 24, 1915.

*F. Review when Commission's findings are without evidence.*—The Appellate Division, it will be noted, handed down the above opinions in *Carroll v. Knickerbocker Ice Co.*, September 15, 1915. More than three months later, in two decisions handed down on the same day, it had this further to say relative to its right and duty concerning the facts in Commission cases:

(*Gardner decision, in part.*)

The findings (of the Commission) are in the most general terms, and in arriving at the conclusion reached we are not hampered by the rule that the

decision of the Commission shall be final as to all questions of fact, nor by the presumption that the claim comes within the terms of the statute. The employer and the insurance carrier are entitled to a hearing. The hearing is of a summary character, and the Commission is not bound by the ordinary rules of evidence and practice. Nevertheless, its determination as to the facts is a *quasi* judicial determination, and must rest upon the facts presented to it, the undisputed facts of the case and the reasonable inferences which may be drawn from them. The Commission cannot act arbitrarily on the information it receives or in direct violation of the conceded facts. Its duty, therefore, is to base its determination upon the undisputed facts of the case and the reasonable inferences to be drawn from the general situation. When its findings are without evidence and in direct conflict with the undisputed facts, and all reasonable inferences which may be drawn from them, its determination may be reversed as error of law. \* \* \* Award reversed and the matter remitted to the Commission for its action. The court finds the following facts, in addition to those found by the Commission: That the claimant was not a foreman or an employee of the construction company in the State of New York, and that he performed no service for it in that State, but was employed solely to perform services as (sic) Ford City, Penn., and received his injury in the course of his employment outside of the State of New York, and it disapproves of any findings inconsistent therewith. *Gardner v. Horseheads Construction Co.*, 171 App. Div. 66, January 5, 1916.\*

(*Rhyner decision*).

HOWARD, J.: This is an appeal from an award to a mother. The principal contention is that the mother was not dependent. But it has been determined by the Commission, as a fact, that she was dependent, and under section 20 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as since amd. by Laws of 1915, chap. 167), where there is any evidence to support such a finding, the decision of the Commission is "*final*" and we are not permitted to review. (*Matter of Hendricks v. Seaman Bros.*, 170 App. Div. 133.) In the record before us there is much evidence on the question of the dependency of the mother and, although it is extraneous to our province to express ourselves upon the subject, we may say that we are convinced that the finding of the Commission was fully justified by the facts presented. The mother had some small means and some other sources of revenue at the time her son died, but the courts will not hold that a claimant must be reduced to absolute want or be declared a pauper, in order to come within the provisions of the act. Partial dependency is sufficient. (*Matter of Wals v. Holbrook, Cabot & Rollins Corporation*, 170 App. Div. 6.)

The appellants contend that the method of computing the deceased's wages was incorrect. We think the conclusion reached by the Commission was correctly worked out. Of course we are unable to say what mental processes the Commission employed in arriving at the figures given in their decision, but it seems to us that, under the evidence, the figures given might, very properly, have been the result of the method of computation pointed out in subdivision 3 of section 14. But here again a finding of fact, based upon evidence, is presented to us and we are powerless to criticise, modify or revoke.

\* The court's view of the facts in this case and its rulings as based upon such view are given elsewhere, on p. 154.

It is not well for this court to fall into the habit of discussing the facts, even for the purpose of showing that the findings of fact are reasonable and meet with our approbation. We cannot, except by usurpation, invade the realm of facts, for it was the clear intent of the Legislature that "the decision of the Commission shall be final as to all questions of fact." Of course if there are no facts and the decision is arbitrary, unfair and unreasonable, a question of law arises and we may right the wrong. (*Matter of Gardner v. Horseheads Construction Company*, 171 App. Div. 66.) But it is wholly improbable that the Commission will make any such decision.

The Commission is the sole judge and the "final" judge of the facts, and this court is not only forbidden to trespass upon the jurisdiction of the Commission in this field, but, by section 20 of the act, it is circumscribed, even, in its review of questions of law. It was the purpose of the Legislature to create a tribunal to do rough justice — speedy, summary, informal, untechnical. With this scheme of the Legislature we must not interfere, for, if we trench in the slightest degree upon the prerogatives of the Commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality.

The award should be affirmed. Award unanimously affirmed; LYON, J., concurred in result. *Rhyner v. Huber Building Co.*, 171 App. Div. 56, Jan. 5, 1916.

Two weeks after the Rhyner decision, the Appellate Division, in *Collins v. Brooklyn Union Gas Co.*, reversed an award to the dependents of an employee who had fallen in the street and fractured his skull. The award was based upon a finding that the employee had stumbled over some obstruction. The court said that there was not a vestige of evidence that such had been the case or that the fall had been due to anything else than an attack of cardiac syncope. The text of the opinion in full appears, above, p. 100.

In May following, the Appellate Division reversed an award in *Tirre v. Bush Terminal Co.*, and remanded the case to the Commission for further hearing. The court said that all the evidence of dependency in the case was hearsay and that even the hearsay did not show that moneys alleged to have been sent to the beneficiary, the mother of the decedent employee in Germany, were in whole or in part necessary for her support or sent for that purpose. The opinion is as follows:

LYON, J.: The decision of the State Industrial Commission awarded to Meta A. Tirre, the mother of August Tirre, deceased, \$2.10 weekly during dependency, and to Eiber Staak, the brother-in-law of deceased, \$100 for his services in the matter of the funeral of deceased. The appellant complains of each of the above-mentioned awards upon the ground that the evidence was

insufficient to justify the finding of the Commission that the deceased came to his death by reason of a personal injury which arose out of his employment, and also upon the ground that the dependency of the claimant was not shown, nor the right of Elber Staak to the award made to him.

August Tirre was a floatman employed by the appellant which operated a terminal at Brooklyn, N. Y., and in the prosecution of its business transported floats, carrying cars between its terminal and the various termini of the railroads along New York harbor. It was the duty of a floatman to take records of the cars upon the float; to see that the cars were properly charged up; that the brakes were applied and placed under the wheels, and that the tugboats were properly tied. The floatman was subject to orders from the tugboat when the float was being transferred. At midnight of July 24, 1916, the deceased arrived at the terminal of appellant on float 31 from the Lehigh Valley Railroad terminus at Jersey City. Thereupon he was directed by the bridgeman, who was his superior, to take his three lamps and other portions of his gear and go aboard float 6, then at the pier, which was loaded with cars, and to stand by until the tug which had brought float 31 over should return to take float 6 to the bridge where the cars which were upon the float would be run upon railroad tracks of the terminal system and thence to the various points of ultimate destination. The deceased was not seen alive subsequent to the giving of such directions to him by the bridgeman. That the deceased followed such directions and went upon float 6 is proven by the fact that about twenty minutes later when the tug came to take the float to the bridge the lanterns and gear of the deceased were upon the float. Two or three days later the drowned body of the deceased was found floating in the slip. While the precise cause of deceased getting into the water is left to conjecture, the evidence was sufficient to fairly make the question as to whether it arose out of the employment one of fact for the Commission. That the death was accidental, and that it occurred in the course of his employment while the deceased was doing his regular work is admitted by the employer in its first notice of injury. That the deceased may have slipped and fallen from the float while inspecting the manner in which the car brakes had been left, or in examining to see that the lines by which the float was stayed to the pier were free is not improbable. The doing of each of these acts was in the line of his duty. He was doubtless ignorant of the manner in which the brakes and the lines were, as he had just arrived at the pier, while float 6 had been there for five or six hours. It was a matter of ordinary prudence for the deceased to make such inspections in order that he might be assured that when the tug had been attached to the float he might be able while standing upon the float to swing the lines off the pier posts, which it would then be his duty to do, and might also be assured that the cars were so stayed upon the float that they would remain there while the float was being moved. The performance of these or other duties which would take him about the float was doubtless what suggested to the bridgeman the testimony that deceased might have fallen and hit his head against the pier. It is also to be noticed that the toilets were upon the pier and tugs and none upon the floats. The theory of suicide finds no support in the evidence, and is excluded by the concession that the death was accidental. We think the question as to whether the death arose out of the employment was fairly one of fact and that the finding of

the Commission in that regard was a reasonable inference from the proofs. The finding of the Commission is, therefore, conclusive upon this appeal.

The second question which arises is whether the Commission was justified in finding that the mother of deceased was dependent upon him. "Dependent" as used in the Workmen's Compensation Law means one who looks to another for support or help. (*Jackson v. Erie R. Co.*, 86 N. J. L. 550; 91 Atl. Rep. 1035.) It is not necessary that the dependency be total in order to entitle the dependent to the benefit of the statute. (*Matter of Wals v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6.) The statute makes dependency at the time of the accident a condition for making an award to a parent. (Workmen's Compensation Law [Consol. Laws, chap. 67; Laws of 1914, chap. 41], § 16, subd. 4, as amd. by Laws of 1914, chap. 316.) It was held in the case of *Main Colliery Co. v. Davies* (2 W. C. C. 108) that the mere fact that a father receives money from a son and expends it is not alone sufficient to establish dependency. The evidence as to dependency is at best very meagre. It consists solely of hearsay testimony of Eiber Staak, the brother-in-law of the deceased and the son-in-law of the claimant. Concisely stated this testimony is that the witness had been told by the deceased that from time to time he had sent money to his mother who lived in Germany, but in what amounts, or how often, the deceased did not tell the witness; witness could not tell exactly when or how often deceased had told him of sending money and did not know when he last told him, the date of which might be important as bearing upon the question as to whether the mother might be presumed to be still living, nor how many times he had told him, but that they worked together and he had told him "lots of times;" that he could not exactly remember the words his brother-in-law used in telling him. The witness also testified that he and his wife, Lena Staak, sister of deceased, had never talked over sending her mother money; that he did not know whether his wife sent her mother money; that "she may do it on the quiet;" and also, "Q. Didn't your wife often tell you that he was sending money home? A. Of course, she got letters, and in the letter her mother stated that she received the money from him, and that she was pleased to receive it, but about these conversations, I forget about it." The only other statement or suggestion to be anywhere found in the record relating to the dependency of the mother, other than is found in the findings of the Commission and the remarks of claimant's attorney, is found in the unverified claim to the employer for compensation, of date August 10, 1915, signed by said Lena Staak, stating that acting for the principal dependent of deceased the claim was presented on behalf of deceased's mother in Germany. The record will be searched in vain for any evidence confirmatory of the claim of actual dependency of the mother. Even the hearsay testimony of the son-in-law contains no statement that the moneys were in whole or in part necessary for the support of the mother, or were sent for that purpose. They may have been sent in discharge of an indebtedness. For ought that appears these indefinite amounts sent at uncertain times may have been gifts from the son to the mother. The statement of the mother in the letter that she was pleased to receive it would properly apply to the smallest present received by the mother from her son in America. Apparently the daughter and the son-in-law did not consider the claimant in need, as apparently they never sent her anything. The daughter who made the claim might be presumed to know if the mother were still living, and if so, as to her

financial circumstances. Notwithstanding this fact, and that the daughter who had given her address upon the said claim signed by her as Columbus avenue, New York city, was apparently the only means readily available of establishing these vital facts, so far as the record indicates she was not called as a witness, nor any excuse given for her absence, excepting that stated by her husband, who simply said "she couldn't come."

The deputy commissioner in charge of the hearing represented not only the employer but the employee as well. It was his duty to see, in justice to both, that all the evidence was brought before the Commission which was readily available and necessary in order to reach an intelligent and just conclusion. To this end we think that the testimony of the daughter who resided in the city where the hearing was had should have been required by means of an adjournment of the hearing if necessary, instead of the findings of dependency being based, as the record would indicate, solely upon hearsay and insufficient testimony of the most flimsy character. The case should, therefore, be sent back to the Commission to the end that the testimony of the daughter and of any other witnesses may be taken as to the existence and dependency of the mother.

Lastly, complaint is made, and justly too we think, of the award to Eiber Staak of the sum of \$100 "for his services in the matter of the funeral and burial" of deceased. The only death benefit allowable under the Workmen's Compensation Law (§ 16, subd. 1, as amd. *supra*) for the funeral and burial is: "1. Reasonable funeral expenses, not exceeding one hundred dollars." There is no provision of the statute which justifies an allowance for services in connection with the funeral and burial. There is nothing whatever in the record indicating that Eiber Staak had paid or had become liable for the payment of any part of any funeral expenses, or had ever made any claim to that effect. In fact, in the whole record there is not a word relating to the subject, otherwise than as contained in the finding. Upon the rehearing the Commission can also take such evidence as may be presented by any person interested in an award relating to funeral expenses. We have not overlooked the statement in the brief of the claimant that there were proofs made before the Commission which are omitted from the record, and which fully justify making the awards. However, there is nothing in the record suggesting that the Commission had any proofs before it, or acted upon any evidence, other than that contained in the record. The claimant's attorney must have been aware that the appellate court must be governed by the record. If he had considered that he had reason to complain of an insufficient record he should have caused the record to be corrected. The remedy was readily available to him. Not only has he not seen fit to have the alleged missing proofs supplied, but his name appears at the end of the stipulation settling the case, stating that the record on appeal contains all the evidence. In view of this, it is certainly not for this court to assume that there was other evidence under which making the awards was justified.

The awards of the Commission must be reversed and the proceeding sent back to the Commission for the taking of further evidence as above suggested and for the further action of the Commission.

All concurred. Award reversed and matter remitted to the Commission for further action. *Tirre v. Bush Terminal Co.*, 172 App. Div. 386, May 3, 1916.

Later in May, the Appellate Division, Presiding Justice Kellogg dissenting, in setting aside the Commission's award in *Lyon v. Windsor and Davis*, said:

Before considering the merits of the question essentially here at issue, viz., whether the claimant salesman was engaged in the "manufacture of \* \* \* women's clothing, white wear \* \* \* or robes" within the meaning of group 38 of section 2 of the Workmen's Compensation Law, expression should be made of regret that the evidence taken in this case is so scanty and meager, and that the findings and record alike are so barren of those details essential to an award under forms of law and in conformance to reasonable procedure. Altogether outside of the merits of the essential question at issue as above outlined, this award would necessarily be reversed and the proceeding remanded to the Commission for hearing, for the reason that by no possibility does the evidence warrant or sustain the findings of fact, nor do the so-called findings or conclusion of fact sustain the so-called rulings of law or the award predicated thereon. Money may not be taken, directly or indirectly, even from the purchasers of women's apparel and the community-at-large, upon such a paucity of findings and proofs.\*

The above-presented opinions of the Appellate Division relative to the power of the courts to review evidence in compensation cases have finally been subordinated to an opinion of the Court of Appeals reversing the order in the Carroll case, July 11, 1916.† The Court of Appeals is divided in this decision, as the Appellate Division was in its decision. Judge Cuddeback writes the prevailing opinion, in which Judges Hiscock, Collin and Hogan concur. Chief Judge Willard Bartlett concurs in the result with a memorandum relative to hearsay evidence. Judges Seabury and Pound dissent in lengthy separate opinions in which each concurs with the other. In support of the Court of Appeals' jurisdiction to review, the majority opinion says: "The decision of the Appellate Division which affirmed the award was not unanimous, and, therefore, there is open in this court the question whether there was any evidence to sustain the finding." Proceeding thence, it adopts the views of Justice Woodward of the Appellate Division in his dissenting opinion to the effect that Workmen's Compensation Law, § 68, relates to the reception of evidence but not to its probative force, and reverses the Appellate Division's order on the grounds that the hearsay evidence of the case is no evidence

\* The full text of *Lyon v. Windsor & Davis* appears above, p. 145.

† The majority and minority opinions of the Appellate Division in the Carroll case have been presented above, pp. 367-374.



and that the presumption of Workmen's Compensation Law, § 21, is overcome by substantial evidence. In his dissenting opinion Judge Seabury justifies the use of hearsay evidence upon the character of workmen's compensation as social legislation, citing German authority, holds the majority opinion's distinction between the admission of hearsay evidence and the basing of an award upon it unreasonable, and declares such concession that hearsay evidence is admissible a concession that it is the legal evidence which precludes the court's power to review. Judge Pound's dissenting opinion is an argument for the probative force of hearsay evidence. The full texts of the majority and minority opinions are as follows:

CUDDEBACK, J.: This is an appeal by the Knickerbocker Ice Company from an order affirming the decision and award of the Workmen's Compensation Commission in the matter of the claim of Bridget Carroll for compensation for the death of her husband, Myles Carroll, which was occasioned as it is alleged by injuries received while he was in the employ of the appellant. The Knickerbocker Ice Company is a self-insurer under the Workmen's Compensation Law. The decedent was employed by the ice company as driver on an ice wagon, and the claim is that he suffered an injury on September 22, 1914, while delivering ice. The commission made certain findings of fact upon which it based an award to the claimant. One of such findings of fact is as follows:

"2. On said date while said Carroll was putting ice in the cellar of a saloon at 20 East Forty-second street, borough of Manhattan, city of New York, the ice tongs slipped and a 300-lb. cake of ice fell upon him, striking him in the abdomen, causing an epigastric hemorrhage and a rigidity of the abdomen. He was taken to a hospital and there developed delirium tremens and died on the 28th day of September, 1914."

Section 21 of the Workmen's Compensation Law (L. 1914, ch. 41) provides that in any proceeding upon a claim for compensation under the law, "it shall be presumed in the absence of substantial evidence to the contrary (1) that the claim comes within the provisions of this chapter," etc. There was in this case substantial evidence to overcome this statutory presumption. A helper on the ice wagon and two cooks employed in the saloon where the ice was delivered, testified before the commission that they were present at the time and place when it was alleged the plaintiff was injured, and that they did not see any accident whatsoever happen to him, and that they did not see any cake of ice fall. The physicians who subsequently examined the decedent testified that there were no bruises, discolorations or abrasions on the surface of his body.

The finding of the commission is based solely on the testimony of witnesses who related what Carroll told them as to how he was injured. Carroll's wife testified that when he came home from his work he told her that he was putting a 300-pound cake of ice in Daly's cellar and the tongs slipped and the ice came back on him. The physician who was called to treat the injured

man at his home, a neighbor who dropped in, and the physicians at the hospital, where he was taken later in the day, testified that he made like statements to them.

The question is presented whether this hearsay testimony is sufficient under the circumstances of the case to sustain the finding of the commission. The decision of the Appellate Division which affirmed the award was not unanimous, and, therefore, there is open in this court the question whether there was any evidence to sustain the finding.

It is a question with text-book writers whether the rules of evidence which exclude hearsay testimony are wise and well founded or not. It is argued by some that though such testimony is not supported by an oath, and is not subject to the test of cross-examination, it is, nevertheless, valuable. There are some jurisdictions in which it has been held that hearsay testimony is admissible (*Insurance Co. v. Mosley*, 75 U. S. 397), but the contrary has always been the rule of the courts in this state which have steadfastly resisted any innovation in the rule. (*Waldele v. N. Y. C. & H. R. R. R. Co.*, 95 N. Y. 274.) But we are not concerned here with any abstract question as to the wisdom or lack of wisdom in the law which excludes hearsay testimony.

We have only to consider whether the law of this state excluding such testimony has been changed in cases coming within the Workmen's Compensation Law by section 68 of that law. That section is as follows:

"Section 68. Technical rules of evidence or procedure not required. The commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties."

This section has plainly changed the rule of evidence in all cases affected by the act. It gives the Workmen's Compensation Commission free rein in making its investigations and in conducting its hearings and authorizes it to receive and consider not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it. The award of the commission cannot be overturned on account of any alleged error in receiving evidence.

This is all true, but, as I read it, section 68 as applied to this case does not make the hearsay testimony offered by the claimant sufficient ground to uphold the award which the commission made. That section does not declare the probative force of any evidence, but it does declare that the aim and end of the investigation by the commission shall be "to ascertain the substantial rights of the parties." No matter what latitude the commission may give to its inquiry, it must result in a determination of the substantial rights of the parties. Otherwise the statute becomes grossly unjust and a means of oppression.

The act may be taken to mean that while the commission's inquiry is not limited by the common law or statutory rules of evidence or by technical or formal rules of procedure, and it may in its discretion accept any evidence that is offered; still in the end there must be a residuum of legal evidence to support the claim before an award can be made. As was said by Justice WOODWARD in his able dissenting opinion at the Appellate Division: "There

must be in the record some evidence of a sound, competent and recognizedly probative character to sustain the findings and award made, else the findings and award must in fairness be set aside by (the) court."

It is not necessary to consider in this case the constitutional limitations upon the power of the legislature to change the rules of evidence. It is sufficient to say that the intention of the legislature as revealed in the Workmen's Compensation Law was not so revolutionary in character as to declare that an award can be sustained which is dependent altogether on hearsay testimony where the presumption created by section 21 of the statute is overcome by substantial evidence.

The only substantial evidence before the workmen's compensation commission was to the effect that no cake of ice slipped and struck the decedent, and there were no bruises or marks upon his body which indicated that he had been so injured. The findings to the contrary rest solely on the decedent's statement made at a time when he was confessedly in a highly nervous state, which ended in his death from delirium tremens. Such hearsay testimony is no evidence. (*Matter of Case*, 214 N. Y. 199.)

It is suggested that the hearsay testimony was admissible as part of the *res gestæ* but according to the rules of the courts of this state, the statements of the injured man in this case were not part of the *res gestæ* but were simply narratives of an event past and gone. (*Greener v. General Electric Co.*, 209 N. Y. 135.)

Since this appeal was taken the workmen's compensation commission has been superseded by the industrial commission, but that change does not affect any of the questions that have been considered.

I recommend that the order appealed from be reversed and the claim for compensation be dismissed, with costs against state industrial commission, and that the question certified to this court be answered in the negative.

WILLARD BARTLETT, Ch. J.: I think that the Workmen's Compensation Law permits the state industrial commission to base an award upon hearsay evidence, in the absence of substantial evidence to the contrary; but where, as in the present case, the hearsay evidence is directly contradicted by the testimony of eye-witnesses to the event, it does not suffice to raise any issue of fact. This view accords with the liberal spirit of the enactment without giving to hearsay evidence a sanction which I cannot believe the legislature intended to give it.

I vote for reversal on the ground stated.

SEABURY, J. (dissenting). This case presents the question whether hearsay evidence, which the workmen's compensation commission after examination deem to be credible, may furnish a sufficient basis to sustain an award made by that commission. The award that was made rests upon the declaration of the injured man to his wife and physician and to another witness shortly before his death. These declarations related to the manner in which he sustained the injury from which he subsequently died. The learned Appellate Division has sustained the award. I think the decision which is now the subject of review is correct. To sustain this award does not mean that the commission are obliged to act upon all hearsay evidence that is presented, but only that it may act upon it where the circumstances are such that the evidence offered is deemed by the commission to be trustworthy. The Workmen's Compensation Law is an insurance scheme by which compensation is

received for personal injuries or death happening in the course of employment. The fund out of which compensation is paid is created by means of contributions which employers are required to pay. Liability under the law is dependent upon injury in the course of employment, not upon contract or fault. (*Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514, 519.) It was because liability was not made to depend upon contract or fault that a prior law designed to accomplish a similar purpose was declared unconstitutional by this court on the ground that the liability sought to be imposed was unknown to the common law. (*Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 294.) Since the decision in the *Ives* case, the Constitution of the state has been amended, and ample power to enact such a law has been conferred upon the legislature. (Art. I, sec. 19, New York Constitution.) In view of this constitutional provision it is unnecessary to determine whether the liability imposed under this law is based upon common-law principles or whether it is based upon principles derived from other systems of jurisprudence. Legislation similar in character seems to have been first successfully applied in Germany. The spirit in which legislation of this character has been applied in Germany is set forth in a pamphlet entitled "The German Workmen's Insurance as a Social Institution," prepared by Dr. Ludwig Lass, imperial government counselor at the imperial insurance office, and compiled and published under the order of that office. In that pamphlet Dr. Lass says: "While the arrangements of the administration and jurisdiction have been made with a view to further social interests, as has been shown above, the question of the interpretation of the workmen's insurance laws has also been settled not only from judicial, but also social points of view, in accordance with the spirit of these laws. In the interpretation of the laws an earnest endeavor is shown, above everything, to give material justice its due, while formal jurisprudence has to stand back. In cases where any legal provision is susceptible of several constructions, that interpretation is preferred, when doubts arise, which corresponds to the intentions of the legislator from the social point of view. There is no anxious clinging to the dead letter; on the contrary, the interpretation is liberal and in keeping with the spirit of the legislation. In this respect, for instance, the interpretation may be mentioned which has been given by Imperial Insurance Office to the words 'accident,' 'work' and 'industrial accident.' Further, mention must be made of the fact that in workmen's insurance matters not the same severe standard is applied by the Imperial Insurance Office to proof, as is customary for disputes in common law. Thus, proof of probability is often considered sufficient. This is important, for instance, with deaths the causes whereof are not cleared up. If a workman is found dead on the working premises and the cause of his death cannot be ascertained, the claims of his survivors, according to strict law, ought to be declined. But according to the jurisdiction of the Imperial Insurance Office the claims for compensation are admitted in cases of this kind, if there is a probability — especially on account of the position of the body — that the death has been caused by anything belonging to the work. A similar view is taken by jurisdiction in the numerous doubtful cases where the accident itself, or the connection between the injury or death of an injured person and the accident, cannot be sufficiently proved." (page 29.)

I think the passage just quoted is significant as revealing the method of interpretation which must be applied if the social benefits which the law was

designed to promote are to be substantially realized. It is in this spirit rather than in a spirit of devotion to common-law methods of proof that the legislature enacted this law. That this is the case appears from the whole purpose of the legislation and particularly from section 68 of that law. In that section it is stated that the commissioners in making the "investigation or inquiry or conducting a hearing *shall not be bound by common law or statutory rules of evidence*, \* \* \* but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties." In this statute we have not only explicit sanction for a departure from common-law methods of proof, but a direct legislative command that the commission "shall not be bound by common law or statutory rules of evidence." In the face of this legislative provision I think there is no justification for rendering the Workmen's Compensation Law subject by judicial interpretation to the technical common-law system of evidence. That the common-law classification of the rules relating to hearsay evidence is far from satisfactory is well pointed out in the extract from the work of Prof. Thayer, which my brother POUND has quoted in his opinion. The Workmen's Compensation Law is a new step in the field of social legislation. We should interpret it in accordance with the spirit which called it into existence. Our reverence for the traditional rules of our common-law system should not lead us to restrict it by subjecting it to the operation of these rules. This court is under no obligation to see to it that laws enacted to remedy abuses arising from new industrial and social conditions shall be made to square with ancient conceptions of the principles of the common law. Indeed, if the common law had not had woven into it by judicial construction the doctrines of assumption of risk and fellow-servant, and the doctrine of contributory negligence, it is doubtful whether the legislation now under consideration would have been rendered necessary. While judges and text writers have often made sweeping generalizations condemnatory of hearsay evidence, the many "exceptions" to the rule prohibiting such evidence show that we have not been able to get along without a frequent resort to it. In cases of homicide dying declarations as to the cause of death are received in evidence, and it is quite within the legislative power to sanction the admission of evidence of a similar kind in cases arising under the Workmen's Compensation Law. The difficulty in proving the cause of death in cases where the person injured dies as a result of the injury has long been recognized, and even in ordinary actions based on negligence the rules requiring proof of freedom from contributory negligence on the part of the deceased are relaxed to some extent. In the case now under consideration the injured man was taken from the place where he was working to his home, and into the presence of his wife and physician. The wife and physician naturally inquired as to how the accident happened, and the injured man told them. The evidence of these persons is now the only evidence available which can explain the cause of death. The commission examined and cross-examined these witnesses, and was satisfied that they correctly reported what the injured man had related shortly before his death and believed that the narrative which the injured man gave was correct. I think that the commission were justified in basing an award upon this testimony and that the language of section 68 of the Workmen's Compensation Law expressly authorized them so to do. .

If it were necessary to do so the award made could well be sustained upon the ground urged by my brother POUND in his opinion. I think, however, that it is more in harmony with the spirit of this legislation and with the express provision of section 68 that we should frankly recognize that the commission are not limited by the common-law methods of proof and that if they were satisfied that the so-called hearsay evidence that was offered was credible they were justified in basing their award upon that evidence.

It is said in the prevailing opinion that "this section does plainly permit the introduction of hearsay testimony in all cases affected by the act, but still it does not, \* \* \* make hearsay testimony, unsupported by other evidence, sufficient ground to sustain such a finding of facts as the commission made in this case." The distinction sought to be made between admitting such evidence and basing an award upon it seems to me to be unreasonable and not to find support in anything contained in section 68. In conceding that section 68 sanctions the introduction of hearsay evidence the argument of the appellant is left without any foundation upon which to rest. If the legislature sanctioned the admission of this evidence it follows by necessary implication that it intended to authorize the commission to act upon it. In resting the judgment about to be rendered upon this ground the court concedes that the evidence upon which the commission acted was legal evidence, but holds that it was insufficient to sustain an award. If section 68 sanctions the reception of hearsay evidence there was legal evidence before the commission and if there was any legal evidence before the commission to sustain the award this court has no power to reverse the determination that was made.

I vote in favor of affirming the judgment of the Appellate Division.

POUND, J. (dissenting): I think this case should not be disposed of by deciding that all evidence held to be objectionable as hearsay in the courts of this state is without probative force. Our law of evidence is largely a product of the jury system. The purpose of its exclusionary rules is to keep from the jury not only all that is irrelevant, but also much that although relevant is remote, or collateral, or non-probative, and, therefore, tends to mislead or confuse. I assume that the industrial commission, although not "bound by common law or statutory rules of evidence" (W. C. L. § 68), must, in exercising its functions, for the sake of system and simplicity, apply certain principles of the law of evidence based on experience as well as authority, the chief being that witnesses should, as far as practicable, testify from their own knowledge of relevant facts, orally, publicly, under oath or affirmation and subject to the test of cross-examination. Yet we cannot overlook the obvious fact that "the changing experience of mankind" may dictate that these fundamental principles be modified and liberalized in their application, when the hearing is before tribunals which adjudicate both on law and fact, and not before a jury summoned temporarily from the vicinage and untrained in the discriminating art of deciding causes on evidence. The ascertainment of truth rather than the integrity of the rules being the foremost consideration, we find that when the jury is absent the rules are less strictly enforced, it being assumed that the court will not be easily confused or misled by that which is irrelevant and inconclusive.

Hearsay is said by the old writers to be "of no value in a court of justice" (Bull. N. P. 294), and "no evidence" (Gilbert on Evidence [2d ed.], 152),

yet the rule against hearsay, even at common law, is subject to many exceptions, and is not inelastic either in statement or application. Thayer in his luminous and philosophic "Preliminary Treatise on Evidence at the Common Law" (pp. 522, 523) suggests that "a true analysis would probably restate the law so as to make what we call the rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible. \* \* \* No doubt, in point of reason, hearsay statements often derive much credit from the circumstances under which they are made, say for example, from the fact of being made under oath, or under impressive conditions as being against interest, or made under strong inducements to say the contrary, or as part of a series of statements or a class of them which are usually careful and accurate, and the like; credit amply enough in point of reason to entitle them to be received in evidence, when once the absence of the perceiving witness is accounted for; and it would in reason have been quite possible to shape our law in the form that hearsay was admissible as secondary evidence, whenever the circumstances of the case were alone enough to entitle it to credit, irrespective of any credit reposed in the speaker."

The rule and its exceptions are not always and everywhere the same. The decisions are not in harmony. What is admissible in one jurisdiction is sometimes excluded in another. In the same jurisdiction the exception as first formulated is sometimes limited or extended by later cases. In *Insurance Co. v. Mosley* (8 Wall. 397) the question was whether the assured died from the effects of an accidental fall down stairs in the night or from natural causes. Assured had left his bed between 12 and 1 o'clock at night and it was held that his declarations to his wife when he came back that he had fallen down the back stairs and hurt himself badly were competent and sufficient proof of the fall because they were made so soon thereafter as to be in the nature of *res gestæ* — declarations contemporaneous with the main fact and part thereof. The evidence was, none the less, *the narrative by a person since deceased of a past, although a recent event*. This court in *Waldele v. N. Y. C. & H. R. R. Co.* (95 N. Y. 274, 278), therefore, very properly characterized the *Mosley* case as "an extreme case," and in *Greener v. General Electric Co.* (209 N. Y. 135, 138) said "the distinction to be made (in such cases) is in the character of the declaration; whether it is so spontaneous, or natural, an utterance as to exclude the idea of fabrication; or whether it be in the nature of a narrative of what had occurred." The force of this rule lies somewhat in the application of it. (*People v. Del Vermo*, 192 N. Y. 470, 483, and cases cited.) Can we say that evidence which the Supreme Court of the United States held competent and sufficient, i. e., the declarations of a deceased person made soon after the alleged accidental injury and under circumstances entitling them to credit is not competent and sufficient proof before the industrial commission under the rule of section 68 of the Workmen's Compensation Law which says that the commission shall not be bound by common-law rules of evidence? May not the commission, under this statute, adopt the rule of the Supreme Court of the United States and in its discretion give it an extremely liberal application and reject the stricter rule laid down by this court without being open to the charge of making an award on no evidence whatever? Could not "the substantial rights of the parties" be thereby ascertained? If it may go so far, we need only hold that where the common-law rule against hearsay is not uniformly stated or applied, the

commission may base an award upon evidence received under the exceptions to the rule most favorable to the claimant, without being bound by the decisions of this court thereon. I think that the evidence of Carroll's declarations to his wife when he came home from work and to the physician called to treat him might, without too violent a wrench to our established ideas, be held competent under the exception to the rule against hearsay applied to the *Mosley* case. In any event as pointed out by my brother SEABURY in his opinion the evidence was legal and admissible. If it had any probative force, its weight was for the commission as triers of fact and their decision thereon was final. (Workmen's Compensation Law, § 20.) I think that we cannot say as matter of law that it had no probative force under section 68 of the act, but I do not thereby conclude that all hearsay has probative force or that awards in contested cases may be allowed or disallowed on rumor or report to which the circumstances give no weight. It is not to be anticipated that the commission will become confused, waste time, lose sight of the main issue and base awards or refuse them on haphazard hearsay, as our convention is that a jury might if it were permitted to hear everything relevant.

I vote for affirmance.

HISCOCK, COLLIN and HOGAN, JJ., concur with CUDDERBACK, J., and WILLARD BARTLETT, Ch. J., concurs in result in memorandum; SEABURY and POUND, JJ., read dissenting opinions, each of whom concurs in the opinion of the other.

Order reversed, etc. *Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, July 11, 1916.

*G. Resulting infection or disease.*—Other commission cases, involving the subtleties of evidence where infection, disease or hernia results from accidents to employees, are noticed elsewhere, pp. 249–256.

*H. Burden of proof.*—In regard to evidence of accidental injury, Sections 18, 21 and 111 of the Workmen's Compensation Law are to be read together. Section 21 throws the burden of proof upon the employer in four important respects and section 111 requires him to promptly report details of the accident to the Commission. Section 18 protects the employer by requiring the injured employee or his beneficiaries to give to the employer and to the Commission certain timely information relative to the accident. The Commission may excuse the employee's failure to give the notice required by Section 18 within its ten days limit, if the employer has not been prejudiced by such failure. Granting of this excuse has been fairly frequent, as, for instance, in *Rist v. Larkin & Sangster*, S. D. R., vol. 5, p. 381, and *Birn v. Bradley Contracting Co.*, S. D. R., vol. 6, p. 319. Now and then, because of long delay, excuse has been denied, as in *Opitz v. Tietze*, S. D. R., vol. 6, p. 347, and *Graf v. Brooklyn Rapid Transit Co.*,



S. D. R., vol. 7, p. 381. In *Marinaccio v. Flynn-O'Rourke Co.*, the employer appealed to the Appellate Division against excuse of the employee's failure to give notice. The Appellate Division upheld the Commission on the ground that, though the employee had not given formal notice within two months and a half, he had given sufficient notice through the employer's physician within twenty days after the accident. The text of the decision is as follows:

LYON, J.: The material question involved upon this appeal is whether the State Industrial Commission was justified in finding that the employer was not prejudiced by the failure of the claimant to give written notice of the accident within ten days after disability, and in excusing such failure to give notice.

The claimant was injured April 1, 1915, while in the employ of the Flinn-O'Rourke Company, which was engaged in performing a contract in constructing a portion of the new subway in the borough of Manhattan, New York city. The injury was to the claimant's right eye. He claims that he was struck by a chip which flew from paving blocks being unloaded from a wagon, but one of the employer's witnesses testified that, about April twentieth, the claimant told him that he had caught cold in his eye and was suffering from that. However, the distinct weight of evidence was that the injury to the eye was caused by a small piece of stone; that the injury was accidental and that it arose out of and in the course of claimant's employment as found by the Commission. No written notice of the accident was given the employer until June 16, 1915, or for a period of two months and fifteen days after the happening of the accident. Notice was sent by the claimant to the Commission six days later. The Commission excused the failure of the claimant to give written notice to the employer of the injury within ten days from the date of disability upon the grounds that the claimant was ignorant of that requirement of the statute, and that the employer had not been prejudiced by such failure. (See Workmen's Compensation Law [Consol. Laws, chap. 67; Laws of 1914, chap. 41], § 18.) It is this finding alone which the employer challenges and to which he devotes his brief.

The claimant was an Italian and a foreman of laborers, or perhaps more properly a superintendent of laborers. Changes in the personnel of the laborers were frequent. They came and went at will. There was evidence upon the part of the employer that none of the persons working for it at the time claimant says he was injured could be located by the employer at the time the notice of injury was given June sixteenth. It appears, however, from the testimony of Dr. Cotter, who was one of the physicians permanently engaged by the employer to attend to persons injured upon the job, that on the twentieth day of April he saw the claimant, was told by him that he had suffered an injury to his eye from the stone chipping, and examined his eye; that he found it very badly inflamed, and regarding the condition as serious sent him to the New York Eye and Ear Hospital for treatment, and that he sent a report of all this to the employer that day, April twentieth. This report states the man's name and station, section of subway work, check

number, address, nature of injury, foreign body in right eye, and disposition. This notice was certainly sufficient to apprise the employer that claimant might have sustained a serious injury which called for investigation. Thus, concededly, the employer had full knowledge of all the facts within ten days after the expiration of the ten days within which the claimant was by law required to give written notice of injury to the employer, and opportunity to make full investigation as to all the circumstances attending the accident. It is probable that the employer could then have obtained statements from some or perhaps all the laborers working there April first. It seems, however, that the employer made no effort to find witnesses except possibly that one of the doctors asked two of the laborers if they saw the accident. Upon the hearing before the Commission two of the three laborers who were working unloading stone from the wagon at the time the claimant was injured testified to claimant having received the injury in the manner claimed by him. The third laborer was said to be in Italy. The claimant testified that he gave prompt notice of his injury on the day following the accident by telling one of the employer's physicians who attended any injured man, the claimant showing him his eye, and that this physician saw the claimant right along as the claimant continued at his work day after day on the job. The claimant went to his own physician immediately after the accident and was treated by him. The employer cannot, therefore, complain that the claimant's condition is attributable to his neglect to cause his eye to be promptly treated. The question whether the employer was prejudiced by the failure of the claimant to give written notice of injury was fairly one of fact. The Commission was fully justified in its conclusions. Its decision is binding upon us. The injury was serious and has resulted in permanent partial disability of the eye.

The award of the Commission should be affirmed. Award unanimously affirmed. *Marinaccio v. Flinn-O'Rourke Co.*, 172 App. Div. 378, May 3, 1916.

While this Bulletin has been in press, the Court of Appeals has reversed an order of the Appellate Division affirming an award in the case of *Bloomfield v. November* and has remitted the claim to the State Industrial Commission on the ground that the Commission failed to make a finding of the existence of either of the two legal reasons upon which it could excuse the claimant's failure to give written notice of the accident to the employer. The decision is as follows:

HISCOCK, J.: The claimant asserts that while she was engaged in the employment of the defendant under conditions which brought her case within the provisions of the Workmen's Compensation Law (Cons. Laws, ch. 67), she pricked her finger, causing injuries of a substantial nature. This injury occurred August 5, 1914, and it is doubtful on her own version whether, within ten days, even fair verbal notice was given to her employer of her injury. At best for her that was a question of fact. Concededly no written notice of injury such as is required by section 18 of the Compensation Law was given for several months after the alleged injury. The failure to give

such written notice within ten days after disability was a bar to this claim "unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the state fund, insurance company, or employer, as the case may be, has not been prejudiced thereby."

Although the commission made findings there was no finding of the existence of either of these reasons as an excuse for the failure to serve the specified notice. We simply have certain "conclusions of fact" pertaining to the occurrence of the accident, disability, etc., a "ruling of law" that the claim came within the provisions of the Compensation Law, and an award, and included in the statement of the latter is the ruling that the "claimant's failure to give the written notice of injury to employer is hereby excused." We think that this is insufficient and not a fair compliance with the requirements of the statute or of good practice thereunder.

We do not intend to qualify what has often been said by this court to the effect that the Compensation Law should be liberally construed to the end of accomplishing the purpose for which it was enacted and that the course of the claimant should not be beset with technicalities. The legislature, however, has deemed it proper and essential under ordinary circumstances that a written notice of disability and claim should be promptly served so as to give an employer the opportunity to investigate the circumstances of the claim. This requirement ought not to be treated as a mere formality or be dispensed with as a matter of course whenever there has been a failure to serve such notice. The legislature has enumerated reasonable conditions under which failure to serve the notice may be excused and we think that the attention of the commission should be fastened upon the question whether upon the proofs in a given case the circumstances do exist which are sufficient to justify such failure, and that if they do exist that fact should be properly stated as one of the facts which constitute the basis of the award. We do not think that it is good practice that the service of such notice should be excused without any finding of the existence of conditions which justify such action on the part of the commission or statement even of the theory on which the excuse has been granted.

In this case, for instance, it is doubtless important as bearing upon this subject whether the claimant did promptly notify the employer, although verbally, of the features of her alleged injury which form the basis for a claim. As I have indicated, I think that on the most favorable version to claimant this was a question of fact and if the commission were influenced in excusing the failure to serve a written notice on the ground that prompt and full verbal notice had been given and, therefore, no harm had been suffered, it ought to have passed fairly and explicitly on this question of fact and have made apparent the ground upon which it excused the failure to serve notice.

In accordance with these views we think that the award and order of affirmance should be reversed and the claim remitted to the industrial commission to pass upon this subject, with cost against the industrial commission to abide the final award of costs.

CHASE, COLLIN and HOGAN, JJ., concur; WILLARD BARTLETT, Ch. J., CUDDEBACK and CARDOZO, JJ., dissent.

Order reversed, etc. *Bloomfield v. November*, 219 N. Y. 374, December 12, 1918.

The employer's failure to give the details required by Section 111 has told against him severely in several instances. In *McQueeney v. Sutphen & Myer* the Appellate Division has upheld the presumptions established by § 21 as constitutional under the new Section 19 of Article 1 of the Constitution of New York. "If the exact cause of the injury," said the court, "is not made plain to the Commission, the employer is at fault." The opinion is as follows:

**KELLOGG, J.:** The claimant was an employee in the shop or factory of the employers whose business was "polished plate and window glass, jobbers and manufacturers of mirrors and bevelled plates." The claimant was injured while assisting two coemployees in raising a light of plate glass, eighty-four by ninety-six inches, from the cutting table. The Commission has made him an award, apparently holding that his employment was within group 20 of section 2 of the Workmen's Compensation Law. That group is "Manufacture of glass, glass products, glassware, porcelain or pottery." Cutting up and bevelling glass, or making looking glasses of it may be considered a manufacture of glass products within the meaning of this law.

The appellants contend that it does not appear that the claimant was engaged in one of the hazardous employments defined by section 2 of the law; that it does not appear that the glass which the claimant was handling was being made into looking glasses or bevelled glass plates or even was to be cut into small-sized plates; that for all that appears he may have been packing glass which had been sold to a customer in the same condition it was in when received at the shop.

This contention overlooks the provision of section 21 that in any proceeding for the enforcement of a claim it shall be presumed, in the absence of substantial evidence to the contrary, "1. That the claim comes within the provisions of this chapter." The presumption in itself is not unreasonable. Under the act the claimant, within ten days after the injury, must notify the Commission and the employer of the accident (§ 18); the employer, within ten days after the accident, must report it to the Commission, giving the nature and the cause of the injury (§ 111); any time after fourteen days the claim may be filed; thereupon the Commission investigates the claim in its own way, and if required by either party gives a hearing (§ 20). We quote from section 68: "The Commission \* \* \* shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties." Some of the provisions are quite unusual, and if they related to ordinary actions or proceedings in court, might with some reason be claimed to infringe upon the constitutional rights of the parties. But section 19 of article 1 of the Constitution authorizes the law and its unusual provisions. Among other things, it provides that nothing in the Constitution shall be construed as limiting the power of the Legislature to enact laws for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation. The

fact, therefore, that the practice is unusual is no objection to it, as the Constitution authorizes the Legislature to create this new remedy and the practice to enforce it.

If the exact cause of the injury is not made plain to the Commission, the employer is at fault, as he has failed properly to report the accident. He has every means of knowing the facts and should not benefit by withholding them. If the employee is engaged in an employment declared hazardous by this law, but at times may work in a non-hazardous employment, it is not unreasonable that the injury should be considered within the act if the employer fails to show all the facts.

The State, in a way, assesses upon such hazardous employment such a sum as may fairly meet its risks, collecting the money in advance, or requiring security for its payment, for the benefit of the injured employees. The amount it collects in each year from each employment is based upon the number of men employed, the payrolls and the particular nature of the employment. The Commission, however, permits an employer to contract for insurance, by which, in case of an injury, the amount of the award shall be paid by the insurance carrier to the State for the benefit of the injured persons, and also permits the employer to be a self-insurer upon his satisfying the Commission that he is able to pay and will pay to it the sums necessary to meet awards for the injuries received by employees in his business. In effect, therefore, the State, through its Commission, undertakes to make compensation for injuries received in these hazardous employments from moneys which the employer has in advance paid or secured to it under a law which declares that such payments may be treated as a proper charge of the cost of operating the business, thus in the end putting the premium upon the ultimate consumer. In contemplation of the act, and the constitutional provision under which it was passed, accidents in the employment finally fall upon the consumer and not upon the employee or employer, the State Commission standing between the employee, the employer and the ultimate consumer.

We, therefore, have a situation in which, if the employer had insured in the State fund, the insurance premium would rest upon the basis that when at work for his employer the claimant McQueeney was to be engaged in the hazardous business all the while, and the premium having been exacted upon that basis *prima facie* the loss should be met upon that basis. The administrators of the fund are not in a favorable position to contend that if he is injured while in the course of his employment the fund is not liable to pay the loss. It is not inequitable that as against the fund the injury should be assumed to be within the law, unless otherwise shown. An employer who is insured in the State fund has been compelled to pay in advance for the injuries arising in his employment, and upon that account, by section 53, is granted immunity from all other liability on account of accident to his employees, and the employees are deprived of all other remedies. If the act is to be construed technically it deprives the employee of its beneficial provisions and the employer from the protection which he has paid for and the State has undertaken to give. The law should be liberally construed so as to give to the employee and the employer alike the protection manifestly intended, and to cast upon the fund the burden which equitably rests upon it. The State, under heavy penalties, has compelled the employer to pay to it

his money on the promise that it would disburse it to protect him from loss on account of injuries incurred in such employment. The State must be held strictly to the obligation it has incurred.

The compensation awarded by the Commission is payable periodically in accordance with the method of paying wages, and in death cases may continue during the lifetime of the beneficiary, and in other cases may continue for a long period of years. No one can be a self-insurer unless he satisfies the Commission of his financial ability to continue all payments awarded, and he may be required to deposit securities to insure such payments. (§ 50.) The risks and changes of business are such that it is evident that the ordinary individual or firm cannot qualify as a self-insurer. The large corporations whose continuous existence is assured, or who are able to deposit the securities required, can qualify as self-insurers. In effect, therefore, the law requires that the ordinary individual and firm, and perhaps the great mass of employers, must insure in the State fund or otherwise. The law, therefore, should be construed on the theory that it contemplates insurance in the State fund, and employers who insure in the State fund or otherwise, or who are self-insurers, should fairly be governed by the same rule. It is the right of the individual employee and of the employer that they should be treated the same as all other employees and employers within the act.

The Legislature may from time to time change the rules of evidence and procedure, and a party's constitutional rights ordinarily are not affected thereby. It may cast the burden of proof upon any party, and may make certain acts *prima facie* evidence of facts if the acts by any reasonable intentment bear upon or tend to establish the facts. The rule of presumption and the provisions of the act do not, therefore, infringe upon the due process of law guaranteed by the Constitution. (*People v. Johnson*, 185 N. Y. 219.)

But the presumption is fairly warranted by the constitutional provision mentioned.

We conclude, therefore, that the Commission was justified in determining that the employee sustained his injury in the course of hazardous employment. The award should, therefore, be affirmed.

All concurred; HOWARD, J., in result. Award affirmed. *McQueeney v. Sutphen & Myer*, 167 App. Div. 532, May 5, 1915.

In *Kohler v. Frohmann*, decided on the same day as the *McQueeney* case, the Appellate Division ruled against the employer because he had failed to show facts excluding the injured employee from compensation. The court said:

KELLOGG, J.: The employer was a retail butcher carrying on a market at 1850 Park avenue, New York city. The intestate was in his employ, and while grinding meat in an electric meat chopper lost four fingers of his right hand which resulted in lobar pneumonia, causing his death, and the Commission has made an award for the benefit of his widow and children.

The appellants contend that the intestate was not engaged in an employment declared hazardous by the statute, and was not, therefore, within its provisions, and that the finding of the Commission is contrary to law and the evidence.

Under group 30 of section 2 of the Workmen's Compensation Law compensation is to be made for injuries sustained or death incurred by an employee engaged in the hazardous employment, "Packing houses, abattoirs, manufacture or preparation of meats or meat products or glue." While the intestate was putting meat into the electric chopper, and was forcing it in with his fingers, he received the injury. It does not appear what kind of meat he was grinding or for what purpose it was being ground. The employer, in his report, gives no further details of the matter. Evidently he knew, or had the means of knowing, the particular purpose for which the chopper was being used at the time of the accident. It does not appear that the intestate was not grinding the meat for sausage or to make some other preparation of meat. The only party presumably having knowledge of the fact has failed to disclose the situation. Such failure raises some inference that the full particulars would not be to his advantage. As the making of sausage fairly comes within the business of a retail meat dealer, the conclusion of the Commission that the case falls within the act is not against the evidence.

Section 21 of the act called upon the employer for more particular information than he gave. The position most favorable to the employer is that a part of his business might fall within the hazardous employment and a part not, and if he claimed the injury occurred outside of the hazardous employment it rested with him to show the facts. In *Matter of McQueency v. Sutphen & Myer* (167 App. Div. 528), decided at this term of court, we have considered the application of this section. The award should be affirmed. All concurred. Award affirmed. *Kohler v. Frohmann*, 167 App. Div. 533, May 5, 1915.

About two months later, in *Powley v. Vivian & Co.*, above, p. 70, the Appellate Division stated that the defendants had not seen fit to offer any explanatory evidence whatever to the Commission and that, therefore, the presumption stood against them. In *Larsen v. Paine Drug Co.*, above, p. 187, it was held that, in the absence of substantial evidence to the contrary, Workmen's Compensation Law, § 21, commands the Commission and the court to presume that a claim is compensatable. In *Cunningham v. Buffalo Copper & Brass Rolling Mills*, above, p. 282, it refused to disturb an award made by the Commission with the consent of the insurance carrier's attorney.

In *Rheinwald v. Builders' Brick and Supply Co.*, above, p. 59, the court held that the presumptions of § 21 are as operative and binding in the court upon appeal as in the Commission. In *White v. N. Y. Central & H. R. R. R. Co.*, S. D. R., vol. 2, p. 477, these presumptions having been cited in the claimant's favor, the award was affirmed by the Appellate Division and by

the Court of Appeals without opinion, 169 App. Div. 903; 216 N. Y. 653.

An employee who had the double duty of operating an elevator and of going the rounds of his employer's building as night watchman was found near midnight lying in an outside entranceway of the building with a fractured skull. No witness could explain his injuries and he died without regaining consciousness. The Commission, notwithstanding the presumptions of Section 21, denied compensation to his widow upon an opinion in which Commissioner Lyon said:

There is no doubt but that under the rulings of the Appellate Division and of the Commission, Fitzsimmons' employment, which was at least partially in the running of an elevator, is to some extent covered by the Compensation Act, and this being so, I was originally of the opinion that the presumption provided for by section 21 of the Compensation Act, to the effect, "that the claim comes within the provision of this chapter," is controlling. After the opinion was prepared in that view of the case, however, the case of *Gleisner v. Gross* was decided (November term, 1915) which seems to hold that where an employee is engaged in an employment not generally denominated hazardous, but who incidentally performs at times services that are hazardous within the meaning of the statute, there must be proof connecting the accident with the particular hazard before compensation can be awarded. The court there said: "If, within the scope of his duties, he was injured while actually and unmistakably doing, at the moment, work of a kind specifically defined in the statute as 'hazardous,' his right is clear; under other circumstances his right must depend on proof of facts regarding which the present findings and the present record are alike inadequate basis for affirming an award."

There being no proof here that Fitzsimmons was injured while actually operating the elevator, compensation must be denied. *Fitzsimmons v. Wadsworth*, S. D. R., vol. 6, p. 351, November 24, 1915.\*

An employee suffering from intestinal ulcers became sick and died. It was alleged that he had been crushed against the side of a truck while at work on the day he became ill and that this accident had caused a rupture of the ulcers. Compensation was denied to his widow on the ground that evidence of the accidental crushing against the truck was insufficient. In connection, Commissioner Lyon said upon the subject of presumptions:

It is true that under section 21, of the Compensation Law, there is a presumption, "In the absence of substantial evidence to the contrary, that the

\* The Fitzsimmons case was argued in the Appellate Division upon appeal, January 4, 1917. The full text of *Gleisner v. Gross & Herbener*, 170 App. Div. 37, is given at p. 89.



claim comes within the provisions of this chapter; " but, this does not mean, I think, that the Commission may indulge the presumption that the accident happened. What the section undoubtedly means is that when an accident has been established, the presumption, in the absence of substantial evidence to the contrary, arises that a claim growing out of the accident falls within the statute. In my opinion the Commission must be satisfied by evidence, either *direct or circumstantial*, that the accident happened, before the presumption established by the statutes can arise. *Hyland v. Winant*, S. D. R., vol. 6, p. 304, September 23, 1915.

I. *Malingering*.—A carpenter fell, injuring his back and sides. When he had received compensation at the rate of fifteen dollars a week for nineteen weeks, a difference of opinion arose between his physicians and the Commission's physicians as to the completeness of his recovery. An eminent specialist, chosen as umpire, charged that the carpenter was malingering. Upon this and other testimony, the Commission denied further award, Commissioner Lyon remarking:

It is sometimes said that an injured workman who has a large family would be very loath to continue on compensation at two-thirds of his earning capacity if he were able to work, because the necessities of the case would almost compel him to return to work if possible in order to receive a higher return in money for the purpose of supplying his family. While the argument may be of force in some cases, it is to be noted that in the present case the claimant is an unmarried man and the compensation of fifteen dollars per week seems to be sufficient to support him in comparative ease without the necessity of any exertion whatever. *Glidder v. Haliver*, S. D. R., vol. 6, p. 366, December 14, 1915.

## APPEALS

(Workmen's Compensation Law, § 23)

A. *Courts to which taken.*—Appeals from the State Industrial Commission are all taken to the Third Department of the Supreme Court, Appellate Division, sitting at Albany.\* The Supreme Court, in New York, is an intermediate court. Further appeal lies from this Appellate Division to the Court of Appeals, the highest court of the State.†

B. *Appeal by state fund insurers.*—L. 1916, ch. 622, eliminated from Workmen's Compensation Law, § 23, a clause which prevented certification of questions of law to the Appellate Division by the Commission where the claim was against the State Fund. By decision of the Appellate Division, employers who insure with the State, unlike employers who insure with private companies and employers who are self-insurers, have no right of appeal from the State Industrial Commission. This denial rests on the theory that Section 53 of the Workmen's Compensation Law shifts all liability of such employers to the State. Their injured employees must look "only to the state fund and not to the employer." The decision is as follows:

SMITH, P. J.: The employer was insured in the State insurance fund. The first point raised is that it has no right to appeal. By section 53 of the Compensation Law it is provided: "An employer securing the payment of compensation by contributing premiums to the State fund shall thereby become relieved from all liability for personal injuries or death sustained by his employees, and the persons entitled to compensation under this chapter shall have recourse therefor only to the State fund and not to the employer. An employer shall not otherwise be relieved from the liability for compensation prescribed by this chapter except by the payment thereof by himself or his insurance carrier." By section 23 of the act it is provided that an award or decision shall be final and conclusive "as against the State fund, or between the parties, unless within thirty days after a copy of such award or decision has been sent to the parties, an appeal be taken to the Appellate Division of the Supreme Court of the Third Department. The Commission may also, in its discretion, where the claim for compensation was not made

\* In 1916, the five justices of the Appellate Division, Third Department, are: John M. Kellogg, P. J., George F. Lyon, Wesley O. Howard, John Woodward and Aaron V. S. Cochrane.

† In 1916, the ten judges of the Court of Appeals are: Willard Bartlett, C. J., William E. Werner, Frank H. Hiscock, Frederick Collin, William H. Cuddeback, John W. Hogan and Samuel Seabury (elective); Emory A. Chase, Benjamin N. Cardoso and Cuthbert W. Pound (appointive). Not more than seven judges may sit in the same case.

against the State fund, on the application of either party, certify to such Appellate Division of the Supreme Court, questions of law involved in its decision." At least as to the certified questions a distinction seems to be made between those who insure in the State fund and those who insure with other insurance carriers. That discretion is probably based upon section 53, above quoted, which gives absolute immunity to the employer after insurance in the State fund, while such immunity is not given after insurance with any other carrier. It is true that the employer has a remote interest even though insured in the State fund, to the end that the risk which he claims not to be within the act may be so decided as affecting any subsequent premiums which he must pay. That interest, however, is too remote an interest to authorize his appeal in a matter where he is not otherwise aggrieved.

Further, the history of this legislation furnishes important light upon its proper interpretation. In the regular session of 1913 two compensation acts were before the Legislature. One was the Murtaugh-Jackson Act, which provided for a system of State insurance, and all employers were required to contribute thereto. This was the only method established for giving security for the payment of compensation. In that act it was provided that the decisions of the Commission were final, except where a claim for compensation was rejected. In the Foley-Walker bill security for compensation was given by providing carriers. There was no system of State insurance, and an appeal was allowed to any party interested. The act as it was passed seems to have been a compromise between these two proposed laws, giving the right of appeal where the insurance is with a private carrier — as in the Foley-Walker bill — and withholding that right where the insurance is by the State insurance fund, as provided in the Murtaugh-Jackson bill.

I recommend, therefore, that the appeal be dismissed. All concurred, except WOODWARD, J., dissenting. Appeal dismissed. *Crockett v. International Ry. Co.*, 170 App. Div. 122, November 10, 1915.

*C. Facts not reviewable.*—In restriction of the right of appeal, Section 20 of the Workmen's Compensation Law declares: "The decisions of the Commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law." This limitation applies to employers generally, whether insured in the state fund or in private companies, and also to employees. The right and duty of the courts to consider and to pass upon the character of the evidence sustaining an award by the State Industrial Commission has been considered at length under the title "Procedure and Evidence," above, pp. 364–397. As stated by the Appellate Division in the Rhyner opinion, p. 375, such power of review is strictly limited to arbitrary, unfair and unreasonable decisions, the court adding that it is wholly improbable that the State Industrial Commission will make such decisions.

Dismissal of appeals on the ground that the courts have no power to review the State Industrial Commission's determinations of dependency and of average wages, when supported by any evidence, have occurred in *Hendricks v. Seeman Bros.*, p. 190, and in *Fairchild v. Pa. R. R. Co.*, p. 179. The Court of Appeals, in *Dale v. Saunders Bros.*, p. 346, held that the question whose employee Dale was belonged solely to the Commission, as a matter of fact and not of law, the courts being denied jurisdiction.

D. *Filing of exceptions, etc., unnecessary.*—In appeal cases, neither the Workmen's Compensation Law nor the rules of the Appellate Division require filing of exceptions or statement of the grounds of appeal in the notice. A decision of the Appellate Division to this effect has been supplemented by amendments of L. 1916, ch. 622, to Workmen's Compensation Law, § 23. In the decision referred to, the Appellate Division said:

The act provides (§ 68) that the Commission in conducting a hearing shall not be bound by common-law or statutory rules of evidence, or by technical or formal rules of procedure, except as in the act provided, but that the Commission may make such investigation, or inquiry, or conduct the hearing in such manner as to ascertain the substantial rights of the parties; that (§ 20) in making or denying an award, the Commission shall make and file a statement of its conclusions of fact and rulings of law; that the decision of the Commission shall be final as to all questions of fact, and except in case of appeal to this court, final as to all questions of law; and that (§ 23) such appeal shall be heard in a summary manner, and shall have precedence in this court over all other civil cases. There is no provision of the statute or rule of this court requiring the filing of exceptions, or, as in England and in some of the States, that the grounds of appeal be stated in the notice of appeal; but it was intended that the procedure both before the Commission and in this court should be simple and without unnecessary delay or useless formality; and that until otherwise provided, the appeal to this court should bring up the whole case, to be heard upon the record of the Commission and the briefs and arguments submitted by the respective parties. *Kenny v. Union Railway Co.*, 166 App. Div. 497, March 3, 1915.\*

E. *Appeal from Appellate Division to Court of Appeals.*—The law governing appeals from the Appellate Division to the Court of Appeals in workmen's compensation cases is the Code of Civil Procedure, §§ 189, 191, as based on the Constitution of New York, Art. 6, §§ 1, 9, and as qualified by the amendment of L.

\* The full text of the *Kenny* case appears above, p. 256. For other cases see also under "Procedure and Evidence," pp. 364-397.

1916, ch. 622, to Workmen's Compensation Law, § 23, which makes the sentence relative to such appeals read: "An appeal may also be taken to the Court of Appeals in all cases where the decision of the Appellate Division is not unanimous, etc." In dismissing an appeal from an order of the Appellate Division unanimously affirming an award of the Workmen's Compensation Commission, the Court of Appeals had thus interpreted the law of appeal from unanimous decisions:

The Workmen's Compensation Law was enacted to provide a new remedy to the employee who received accidental injuries in the course of his employment, or in case of the death of the employee, to his dependents. (*Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514.) It provides a summary remedy which differs in substantial respects from a civil action to recover damages for personal injuries caused by negligence. It is not instituted in a court, but is conducted by an administrative board or commission, and is commenced by a notice of injury and claim. Notice is given to all parties interested. The proceedings before the commission are informal. The decision of the commission on the facts is made final and conclusive. (Workmen's Compensation Law, section 20.) In the absence of constitutional or statutory sanction there is no right of appeal. The provision of section 23 of the Workmen's Compensation Law that an appeal may be taken to the Court of Appeals in all cases where such an appeal would lie from a decision of the Appellate Division, is subject to the restriction contained in the clause of the statute which provides that such appeals may be taken "in the same manner and subject to the same limitations as is (are) now provided in civil actions." By this language the legislature intended to assimilate the practice upon appeal to the Court of Appeals in these cases to the practice now obtaining upon appeals from judgments in actions for damages for personal injuries resulting from negligence. The limitation upon appeals in actions of that character is contained in section 191 of the Code of Civil Procedure. Under the limitation therein prescribed no unanimous decision of the Appellate Division is appealable to the Court of Appeals unless the Appellate Division permits such an appeal and certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or unless, in case of its refusal to so certify, an appeal is allowed by a judge of the Court of Appeals. A different interpretation would fail to give effect to the provision of section 23 of the Workmen's Compensation Law, which subjects appeals from a decision of the Appellate Division to the same limitations that are now provided in civil actions of the character referred to. The policy of the Workmen's Compensation Law was to devise a method by which payments to workmen who sustained personal injuries should be made in an expeditious manner, and thus avoid the delays incident to the method of granting relief in cases of this character through a civil action for damages. We do not think that the legislative design was to extend the right of appeal or to permit appeals to this court in cases arising under the Workmen's Compensation Law where no right of appeal would exist if the employee had sought to enforce his rights in an action for damages

for personal injuries resulting from negligence. *Harnett v. Steen Co.*, 216 N. Y. 101, October 19, 1915.

This decision has been confirmed by the above cited amendment to Workmen's Compensation Law, § 23. Prior to the amendment, the law relative to appeals from decisions of the Appellate Division that were not unanimous was uncertain. The Court of Appeals has dismissed an appeal from the divided court decision of the Appellate Division in *Rheinwald v. Builders' Brick and Supply Co.*, 168 App. Div. 425, without opinion. The motion to dismiss was based upon the two arguments that the parties had not obtained permission to appeal and that the State Industrial Commission had not finally passed on the case by making an award in accordance with the Appellate Division's reversal order. The absence of an opinion left a doubt as to which of these two arguments, if not both, had influenced the Court of Appeal in its dismissal.

*F. No appeal to courts other than the Appellate Division of the Third Department.*—Having been denied compensation by the Commission, an injured employee brought an action for damages in Special Term of the Supreme Court in Erie County. The court held that the Commission's finding that the employee's injuries were not due to an accident debarred an action for negligence and that, if the Commission was in error, the employee's remedy was an appeal to the Appellate Division of the Third Department. The decision is as follows:

WHEELER, J.: The complaint sets forth a cause of action for alleged negligence under the Employers' Liability Act of this state. It alleges in substance that the defendant negligently failed to furnish and provide the plaintiff while in its employ "with reasonably safe implements, appliances, ventilators, fans, blowers or other devices \* \* \* for the carrying away of poisonous and dangerous gases and fumes; in permitting and allowing poisonous gases and fumes to accumulate and remain in and about the place in which this plaintiff was required to work, \* \* \* and through the carelessness and negligence of defendant" in other ways failing and neglecting to perform certain alleged duties for the proper and reasonable safety of the plaintiff, whereby it is alleged the plaintiff inhaled certain poisonous gases and fumes, which occasioned permanent injuries to his lungs and other portions of his body. It is not necessary to go into further details as to the allegations of the complaint.

In its answer, the defendant makes certain denials of the allegations of the complaint, and alleges that the alleged injuries received by the plaintiff

were due to the risks incident to his employment and known to him and that such risks were assumed by the plaintiff. Then follows the following allegations, to wit:

"Fifth. For a further and separate defense herein the defendant alleges, upon information and belief, that the same plaintiff heretofore and on or about the 2nd day of February, 1916, in accordance with the provisions of the Workmen's Compensation Law of the State of New York, presented to defendant the alleged claim referred to in the complaint for compensation according to the benefits described in said Workmen's Compensation Law for said alleged injury claimed to have been sustained by him in the course of his said employment with the defendant, and that thereafter said State Workmen's Compensation Commission, and on or about the 29th day of March, 1916, after a hearing duly had thereon, adjudged that the alleged accident claimed to have been sustained by the said plaintiff did not constitute an accident and adjudged that plaintiff's said alleged claim be disallowed; and that by said judgment this action became and was forever barred and foreclosed."

To this clause or portion of the defendant's answer the plaintiff demurs on the ground that the said defense is insufficient in law. It was conceded in the argument of this demurrer that the employment in which the plaintiff was engaged at the time he received the alleged injuries was one of the hazardous employments covered by the provisions of the Workmen's Compensation Law.

If the plaintiff's injuries were in fact occasioned owing to the negligence of the defendant in the particulars specified in his complaint, it is difficult to see why the plaintiff should not have been given compensation under the provisions of the Workmen's Compensation Law.

After specifying what are to be deemed hazardous employments section 10 of the act provides that:

"Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an *accidental* personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury," except in cases of injuries resulting from intoxication or those wilfully and intentionally inflicted.

We fail to see therefore, if the allegations of the complaint are true, that the plaintiff's injuries were the result of the defendant's negligence, why the plaintiff was not fairly entitled to compensation for his injuries under the provisions of the Compensation Act, as a "disability \* \* \* resulting from an *accidental* injury, \* \* \* arising out of and in the course of his employment." *Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514; *Matter of Winfield v. N. Y. C. & H. R. R. Co.*, 216 id. 284; *Connors v. Semet-Solvay Co.*, 94 Misc. Rep. 406.

An "*accidental injury*" as used in this statute is clearly distinguishable from an injury in the nature of a vocational disease, sustained in the course of an employment, where from the inherent nature of the work disease is likely to be contracted. "*Accidental*" has been defined as "happening by chance, or unexpectedly taking place, not according to the usual course of events: casual; fortuitous." *North American Life & Accident Ins. Co. v. Burroughs*, 69 Penn. 43; 8 Am. Rep. 212.

In insurance policies providing for an indemnity, "accidental" cause is defined as "an event happening without human agency, or, if happening through human agency, an event which under the circumstances is unusual, and not expected to the person to whom it happens."

Within these recognized definitions of the word "accidental," if the injuries sustained by the plaintiff were occasioned in the manner alleged in the complaint they were clearly "accidental" within the meaning of the Workmen's Compensation Law; and the plaintiff would have been entitled to compensation as provided in that act.

When therefore the compensation commission found and determined, after a hearing, that the plaintiff's injuries were not the result of an "accident" it found by necessary implication, that such injuries were not due to the defendant's negligence, or occasioned as alleged in the complaint.

The importance and legal significance of this adjudication by the compensation commission arises out of the fact that by the provisions of section 20 of the Compensation Law the commission is required to determine the claim made before it for compensation, after notice to the interested parties, and an opportunity to present evidence and be represented by counsel. The act then declares that "*The decision of the commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law.*"

Therefore it is that the holding of the commission that the plaintiff's injuries were not due to "accident" makes that question *res adjudicata* as to the plaintiff and the defendant in this action, and precludes a further inquiry into the questions of fact in this action.

The adjudication of the compensation commission was therefore properly set up in the answer of the defendant, as bar against the plaintiff in an effort to establish in this action that his injuries were occasioned by the negligence of the defendant, which our interpretation of the act would constitute an "accidental injury."

If the compensation commission was in error on the decision of the application made to it, the plaintiff's remedy was to appeal from its decision to the Appellate Division of this court, as provided in section 23 of the Compensation Law.

I am therefore of the opinion that the demurrer of the plaintiff to the fifth clause of the defendant's answer should be overruled, with costs of this demurrer.

Demurrer overruled, with costs. *Naud v. King Sewing Machine Co.*, 95 Misc. 676, June 20, 1916.

*G. Costs of Appeals.*—June 16, 1916, the Court of Appeals decided that the costs of a reasonable but unsuccessful appeal by an injured employee should not be assessed against him but against the Commission. The memorandum is as follows:

**PER CURIAM:** The decision handed down in this case on April 25, 1916, read as follows: "Order reversed, with costs, and claim dismissed." Doubt having arisen as to the parties against whom the court intended to award costs by this decision, the attorney-general has moved to amend the remittitur



so as to provide for costs against the claimant only. Counsel for the appellants agrees that the remittitur should be amended by inserting therein the name of the party against whom costs are awarded, but contends that the costs should be awarded against the state industrial commission rather than against the claimant.

Section 23 of the Workmen's Compensation Law (L. 1914, ch. 41) provides that an appeal may be taken to the Court of Appeals under the act in all cases where such an appeal would lie from a decision of an Appellate Division "in the same manner and subject to the same limitations as is now provided in civil actions." Section 24 provides that if the commission or the court before which any proceedings for compensation or concerning an award of compensation have been brought "determines that such proceedings have not been so brought upon reasonable ground, it shall assess the whole cost of the proceeding upon the party who has so brought them."

We regard this provision of section 24 as mandatory, and as requiring us to award costs against a party to an appeal under the act whenever we determine that the proceeding has not been brought upon reasonable ground. Such cases, however, are exceptional. In cases involving no element of unreasonableness the award of costs is left by section 23 of the statute to the discretion of the court; and ordinarily in the exercise of that discretion costs will not be awarded against an unsuccessful claimant personally, but will be charged against the state industrial commission, which virtually represents such claimant through the attorney-general.

In the present case the remittitur should be amended so as to award costs against the state industrial commission.

WILLARD BARTLETT, Ch. J., HISCOCK, COLLIN, CUDDIBACK, HOGAN, SEABURY and POUND, JJ., concur.

Ordered accordingly. *Wilson v. Dorfinger & Sons*, 218 N. Y. 120, June 16, 1916.

On the same date, the same court decided that the costs of an unsuccessful appeal by an employer and insurer from an award of the Commission will ordinarily be assessed not against the Commission but against such employer and insurer. The memorandum is as follows:

**PER CURIAM:** The motion to recall and amend the remittitur so as to relieve the employer and insurance company from costs awarded on the appeal to this court should be denied. We affirmed the award which had been made to the claimant. The motion by the appellants to be relieved from costs on such affirmance seems to be based on the theory that such costs may only be allowed where it has been determined that the appeal was not brought upon reasonable grounds, and it is insisted that in view of the division which existed amongst the members of the Appellate Division on the question whether the award should be affirmed, the appeal was entirely reasonable. The appellants misconceive the theory on which costs have been awarded.

## Previous Publications Concerning Occupational Diseases

Statistics of occupational diseases reportable by physicians to the Department of labor appeared in the quarterly Bulletins during the years 1912-1913 (number 50-56 inclusive). The annual report of the Department for 1915 summarizes reported cases down to August of that year.

Beginning with 1908, the annual reports of the Medical Inspector of Factories, appearing in the annual reports of the Department, have contained reports upon, and discussions of, occupational diseases in New York State. Included in these reports are accounts of the following special investigations of particular industries, together with proposed regulations for their conduct:

Bakeries in Manhattan borough, 1909, pp. 88-99.  
Calico print industry, 1909, pp. 80-88 (this account appeared also in Bulletin No. 41).  
Cloak and suit industry in New York City, 1911, pp. 87-96.  
Felt hat industry, 1911, pp. 57-67.  
Pearl buttons, 1910, pp. 93-103.  
Phosphorus matches, 1910, pp. 83-93.  
Potteries, 1909, pp. 100-112.

The following special reports on ventilation have also appeared in the reports of the Medical Inspector:

Results of air analyses in certain factories, 1910, pp. 104-111.  
Results of air analyses in cloak and suit factories in New York City and in the felt hat industry, 1911, pp. 108-138.  
Ventilation of factories, 1908, pp. 65-94.  
Ventilation of a department store, 1911, pp. 83-86.

Other material published includes the following:

Sanitary Conditions in the Printing Trade (82 pp.). Annual Report of Bureau of Labor Statistics, 1906, pp. lxxi-clii.  
Health of Printers (8 pp.). Bulletin No. 33, 1907, pp. 258-265.  
An English Report on Physical Deterioration (8 pp.). Bulletin No. 30, 1906, pp. 372-379.  
Special Rules and Regulations Adopted by the British Government for the Regulation of Certain Dangerous Trades (47 pp.). Annual Report of Bureau of Labor Statistics, 1906, pp. 833-879.  
The Dangerous Trades in England (4 pp.). Bulletin No. 33, 1907, pp. 255-258.  
Poisoning by Wood Alcohol Fumes from Brewers' Varnish. Bulletin No. 51, pp. 130-137. Also printed separately.  
Lead Poisoning Eliminated in a Factory (relates to protection against dust in the sand-papering of castings). Bulletin No. 64, pp. 64-70.  
Anthrax in Woolen Mills and Tanneries. Bulletin No. 56 pp. 402-5.  
Chrome and Lime Sores in Tanneries. Bulletin No. 56, pp. 406-8.  
Advice to Workmen for Prevention of Lead Poisoning (cards for distribution to workers, printed in English, German, Italian, Hungarian, Polish and Yiddish).  
The Reporting of Industrial Diseases (small pamphlet containing the reporting law, explanation of purpose of reporting, and lists of diseases and harmful substances).  
European Regulations for Prevention of Occupational Diseases. Special Bulletin No. 76 (77 pp.).  
Anthrax. Special Bulletin No. 79 (22 pp.).

Of the publications above referred to, files of which may be found in many public libraries, the Department can supply only the Annual Report of the Commissioner of Labor for 1909 and 1910, Bulletins 51 and 54, reprints of the article on wood alcohol in Bulletin 51, the cards concerning lead poisoning, and Special Bulletins 76 and 79.



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**SPECIAL BULLETIN**

Issued Under the Direction of  
**THE INDUSTRIAL COMMISSION**

<b>JOHN MITCHELL, Chairman</b>	
<b>EDWARD P. LYON</b>	<b>JAMES M. LYNCH</b>
<b>LOUIS WIARD</b>	<b>HENRY D. SAYER</b>

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**HOODS FOR REMOVING  
DUST, FUMES AND GASES**

Prepared by  
**THE DIVISION OF INDUSTRIAL HYGIENE**



## **HOODS FOR REMOVING DUST, FUMES AND GASES**

The term "hood" is understood to mean a covering or flared pipe of conical, pyramidal or other shape, connected to a flue or chimney which leads to the outer air, placed in such a position, above, below or adjacent to pots, pans, vats, machines or other receptacles as to catch and convey from them gases, vapors, fumes or dust which may be generated in them.

The importance with which hoods and pipes are regarded as a means to remove dust, vapors and gases, is shown in sections 81 and 86 of article 6 of the Labor Law of the State of New York and rules 700, 717 and 721 of the Industrial Code. The efficiency of these devices is entirely dependent on conditions within the factory, the character of the device, its size, position, character of flue, nature of material dealt with, and distance from the machine or apparatus from which the gases, vapors, etc., are evolved.

## **PHYSIOLOGICAL EFFECTS OF DUST, FUMES AND GASES**

In discussing the origin of the various dusts to which the industrial worker is exposed, we may use the classification usually accepted as follows: (1) mineral, (2) metallic, (3) vegetable, (4) animal, and (5) combination of two or more of the above. But in describing the physiological effects of dust we may disregard this classification and consider the different forms of dusts according to their effects as follows:

(1) Irritating dusts which have only a mechanical action and act directly upon the parts most exposed.

(2) Poisonous dusts which, when entering the system, cause a general poisoning, or have an affinity for certain parts of the body, such as blood, bones and the nervous system.

(3) Infected dust which carries pus germs.

The action of irritating dusts, found in metal grinding (iron, steel, brass and copper) sandstone cutting, emery grinding, etc., is chiefly local, affecting the parts of the body directly exposed, such as the eyes, nose, throat and skin. The sharp pointed

particles may enter the unprotected eye of the workman and cause an injury, the extent of which depends upon the amount entering the eye, and the force with which it enters. The thin transparent membrane covering the eye and lining the lid becomes red and inflamed; there will be pain, great sensitiveness to light and an increased amount of tears. If neglected, infection may occur by dirt entering the eye, or from attempts to remove the particle with an unclean rag or tooth pick. Pus will form, the eye lids will be swollen and stick together, and the eye may be permanently injured.

Should the sharp metallic particles be inhaled, the lining membrane of the nose may become affected, show redness, swelling and an increased nasal secretion, followed by an inflamed condition of the skin around the nostrils. Later, chronic nasal catarrh often develops, also causing a loss of the sense of smell. Not only is the lining membrane of the nose affected, but also that lining the tube which extends to the ear. This inflammation affects the middle ear, and causes an unpleasant sensation of "ringing in the ears," followed by a considerable loss of hearing.

Most important of all, this irritating dust may pass beyond the nose, throat and bronchial tubes, and enter the lungs, thereby causing a chronic inflammation and rendering the worker more susceptible to tuberculosis.

Other irritating dusts such as wood, hemp, cotton, jute and tobacco, may cause chronic inflammation of the eyes, nose, throat, lungs or skin; that of fur, feathers and hair may likewise have an irritating effect, and, in addition, carry pus germs with which the worker may become infected.

Corrosive dust, such as soda and lime of potash, used in the manufacture of soaps and bleaching powders, causes inflammation and ulceration of the skin and parts exposed.

Poisonous dust, such as lead, arsenic and salts of mercury, the most common of which is lead dust, to which the worker is exposed in innumerable trades, usually enters the system by being inhaled, or through the stomach by eating food contaminated by lead-laden hands. When entering the stomach the lead, after undergoing changes, becomes absorbed and enters the blood thus being carried to all parts of the body. The tissues chiefly affected are the arteries, nerves, brain, muscles and also the blood.

Dangerous fumes, vapors and gases to which the worker is exposed usually show their effects immediately on account of the rapidity with which they enter the blood and are carried to all parts of the body. The symptoms vary according to the amount inhaled. The fumes may be classified as follows:

(1) Irritating fumes and vapors which act locally upon the eyes, the mucous membranes of the nose, throat, larynx, bronchial tubes and the lungs, such as ammonia, chlorine, nitric and sulphuric acid.

(2) Poisonous intoxicating fumes and gases, such as benzol, wood alcohol, carbon disulphide, benzine, aniline and lead, which affect the blood, heart and circulation, the nervous system and digestive organs.

(3) Others, such as wood alcohol, affecting the optic nerve and causing blindness; chromic acid which causes ulceration and perforation of the partition separating the nostrils; phosphorus which affects the jaw bone, and mercury which particularly affects the teeth and lower jaw.

Irritating fumes, such as ammonia cause intense inflammation of the transparent membrane covering the eyes. The fumes of nitric acid have been known to cause intense inflammation of the mucous membrane of the bronchial tubes, and later, when the worker has apparently recovered from the effects, inflammation of the lungs appears, causing death in a few hours.

Intoxicating fumes, such as carbon disulphide, benzol, dinitrochlorbenzol and benzine cause headache, dizziness, nausea and weakness in the legs.

Poisonous fumes, such as aniline, may cause attacks varying in severity with the amount inhaled. Those unaccustomed to the fumes are particularly susceptible. In mild attacks there will be headaches, dizziness, pain in the eyes, a feeling of fullness in the head and great weakness in the knees. The speech is slow and uncertain which, with the staggering walk, gives the appearance of drunkenness. The worker's face is pale at first, later blue and he breathes with difficulty. If treated at this time, by inhalations of fresh air and heart stimulants, he recovers in a couple of days. But should the worker be so unfortunate as to fall and be unnoticed in some secluded part of the plant, he will continue to

absorb the aniline fumes and death will occur very shortly. Very frequently the worker apparently recovers, returns home and during the night, or the following day, the symptoms recur; the pulse becomes feeble; breathing is slow and difficult; unconsciousness and convulsions will occur followed by death.

Lead fumes arising from improperly hooded metal pots in the composing rooms of the printing industry, frequently cause anæmia and lead poisoning among the printers.



**Figure 1.**

Hoods entirely enclosed, having sliding door in front with openings for the insertion of hands and arms of operators. The workmen are thus entirely protected from the vapors generated within the hood.

Wood alcohol is used frequently in the preparation of varnish and shellac, in the manufacture of hats, artificial flowers and for dissolving dyes. In poisoning from the fumes, the worker suffers with cramps, nausea, vomiting, headache and dizziness. His flesh is tender to the touch, his temperature is low and he complains of great chilliness and weakness. The symptoms very much



resemble those of ptomaine poisoning. In addition the sight is affected, varying in degree from dimness of vision to complete blindness. In fatal cases, death occurs from paralysis of the heart. Wood alcohol possesses a particularly harmful effect upon the optic nerve, causing blindness, even in mild cases of poisoning.

Mercurial vapors are met with in the manufacture of several scientific instruments and mercurial salts. While mercury is one of the heaviest of metals, it is known to volatilize, or evaporate, at ordinary temperatures. For this reason all operations should be performed under hoods. The fumes, when inhaled, affect the blood and nervous system, particularly the teeth, gums and jaw bone.

#### AIR CURRENTS IN HOODS

There are three methods practiced in removing dust, fumes and gases generated in the process of manufacturing operations. These are by downward, lateral and upward movements of air currents. The downward system of ventilation is applicable in the removal of heavy gases, fibre and wood dust. In this system hoppers or traps are placed beneath the table or machine, aided by a mechanical air current. Lateral system means one in which pipes or hoods are placed at sides, front or back of machines, when conditions are such that the devices for removal of the dust cannot be placed above the vat, pan or machine, and is applicable in the cases of removal of dust or fumes generated at heckling and pickling before galvanizing. An upward system of air means ventilation by the removal of dusts, fumes and gases from machines or vats, when the material cast off is lighter than the air and has a tendency to rise, when it can be more readily caught by a flared pipe or hood, if properly made and placed above the machines. By far the greater number of hoods fall within the third class.

Again, the removal of gases and dust may be effected by either natural or mechanical means. When a stack or chimney is placed above a vat, tank, melting-pot or machine, from which vapors, dust or heated air are being discharged having a temperature higher than the outside air, the heated air and material will rise in the pipe or chimney due to the lesser weight of the warm air or gases inside the chimney than the cooler air surrounding it.

Cooler air, when drawn into the room from the outside, falls to the floor, is drawn to the machine or vat, is warmed and flows into the base of the hood and pipe. The cooler air, flowing in at the base pushes the lighter air upward, thus producing a constant current as long as the material cast off is heated to a higher degree than the outside air.

The aspiration in such a chimney is either expressed in inches of water measured by a "U" tube, one end of which is placed in the chimney, while the other is open to the outer air, or as the velocity of air per minute which can be readily determined by an anemometer. The velocity of air in a stack or flue is theoretically figured according to the formula  $V = 8.02 \sqrt{\frac{H(t-t^1)}{A-t^1}}$ , in which  $V$  = velocity,  $H$  = height of stack,  $t$  = the temperature of the air within the chimney,  $t^1$  = the outside temperature and  $A$  = the absolute temperature. In practice, the results obtained are found to vary considerably, due to friction and failure to allow for sufficient influent air to enter the workroom to make up for the air ejected through the chimney or pipe. For example, a chimney twenty-five feet high having a temperature of ninety degrees within, when the temperature outside is sixty degrees, gives according to the calculation a velocity of 9.63 feet per second.

Hoods placed above melting pots or vats, often fail to properly remove by natural means material thrown off, first for the reason that in starting the heat beneath the device, containing lead or acids, considerable time elapses before the column of air in the stack is set in motion to cause a fair air velocity. Secondly, unless the hood can be lowered to a point at which the base of the hood almost touches the receptacle giving off vapors, etc., or is enclosed on three sides, drafts from windows or doors will deflect the heated air current outside the hood and cause it to enter the room.

Physical experiments conducted with air currents in connection with a forty-two inch diameter hood at its base, enclosed on three sides, having an opening in front measuring thirty inches square, placed over a pot of lead alloy, the temperature of which was five hundred and five degrees Fahrenheit, the surface of which measured seven hundred and six square inches, equal to thirty

inches diameter, revealed an air current passing into the hood at a velocity of one hundred and fifteen feet per minute or seven hundred and nineteen cubic feet per minute. The hood was connected with a pipe ten inches in diameter. Mechanical means were used to move the air. No lead was found, by chemical analyses, in the air of the workroom, sampled three feet from the hood. A hood constructed as above gives fairly good results in removing heated air and lead dross. Hoods or pipes, as described, placed above forge fires or metal pots where the pipes are vertical, in which there is an aspiration of one thousand feet per minute, would be considered as satisfactory.



**Figure 2.**

Metal pots entirely enclosed on three sides. Drafts cannot affect the upward current of heated air, expelled by the fan.

Wind is often the cause of intermittent down drafts in chimneys or stacks placed above metal pots, etc. This is usually caused by the top of the chimney being situated in such a manner, that the wind pressure, deflected downward is greater than the circulating pressure within the chimney, resulting in the gases and dust being thrown into the workroom. This is usually caused by

the stack being located near a wall, or building, which is higher than the stack. The remedy for this is to raise the outlet above the wall, or roof, then the wind blowing across the top of the stack will have an unimpeded course. Cowls, either stationary or automatic, often serve to correct the trouble, but are as often a hindrance to aspiration in the stack in a calm.



Figure 3.

Hoods above picker machines, situated too high. Drafts through windows blow dust from machines into workroom. The hoods remove but little dust from the pickers.

Hoods, such as shown in Figure 3, fail to remove all the material thrown off from vats, pans, etc., when placed several feet above the latter or with pipes connected to them which are of small diameters. Of one hundred hoods examined by investigators, but fifteen were found to be effective to remove the dust, fumes and gases. For example, it was noted that in a certain hood, placed above a vat to remove fumes, of a quadrangular, pyramidal shape, having a base measuring four feet square, to which was attached a pipe six inches in diameter, in which there was an air velocity of five feet per second, there passed through

the pipe 58.5 cubic feet of air per minute. As the area of the hood was sixteen square feet at its base, the velocity of air entering the hood at the base, theoretically figured, was only three feet seven and a half inches per minute, a decidedly small amount. It was found that air entering a hood does not do so uniformly, as one might suppose. Drafts and currents of air of different temperatures cause the air to travel the path of least resistance,



**Figure 4.**

Battery of hoods, placed above pickling tanks to remove acid fumes and steam. Note manner in which pipe enters main at angle of 45 degrees. Suction at edges of hood is greater than inside hood.

causing the air to be drawn in at one corner or at the side, showing the necessity of having the hood extend to the vat or pot on three sides, and of having aspiration of at least two hundred feet at the base of the hood, and the pipe leading from the hood not less than one-sixteenth the area of the hood at its base and extending out six inches in each direction beyond the furnace or vat.

### DOUBLE HOODS

One of the most effective types of hoods which can be used to remove vapors, gases, etc., when placed above tanks, vats or machines, is the doubled-wall hood, with a clearance of one inch between the inner wall and outer wall at the edges, at which there should be a minimum air velocity of not less than one thousand feet per minute, and two hundred feet per minute over the central area of the hood. The opening at the apex of the hood together with the area at the base between the inner and outer wall of the hood should equal the area of the pipe or branch pipe from the top of the hood. The mouth of the hood should extend over the furnace, vat or machine at least six inches in every direction, if the hood is not elevated more than two feet. For each additional two feet of elevation, such hoods must be increased six inches in all directions. The farther away from the vat, the less effective the hood will be. The outer wall of the hood should be extended an inch or an inch and a half below the inner shell, whereby rising fumes are more readily caught than if the walls are the same length. It is of course necessary to provide mechanical air movement, instead of relying on natural aspiration. Air currents, from windows and doors, do not affect the upward movement of air in these hoods as readily as the single type. Still, it must be remembered that sufficient openings should be provided in the workroom to allow for the removal of air through the hoods, as a partial vacuum is naturally created in the removal of air from the workroom.

Chemical tests of air were conducted whereby large quantities of air were used taken five feet from the hoods to determine the effect of this style of hood, resulting in mere traces of material being found in the vapors given off from the vats. As the sampling was done covering an hour's time, with the small traces found it was safe to judge such hoods efficient.

### CASE OF LEAD POISONING DUE TO POORLY CONSTRUCTED HOOD

A case of plumbism was reported in 1916 to the Department of Labor by the proprietor of a factory in which an employee had been working as a machinist for a period of five months, about twenty feet distant from two metal pots, using Babbitt metal.

The metal pots were provided with a hood, which had been erected at some previous time and was thought sufficient to remove lead dross from the surface of the molten metal.

It was found that the workman was a careful, clean and tidy person, chewed no tobacco, ate no meals in workroom, had neither worked with nor used paint, nor drunk any water from pipes newly joined.

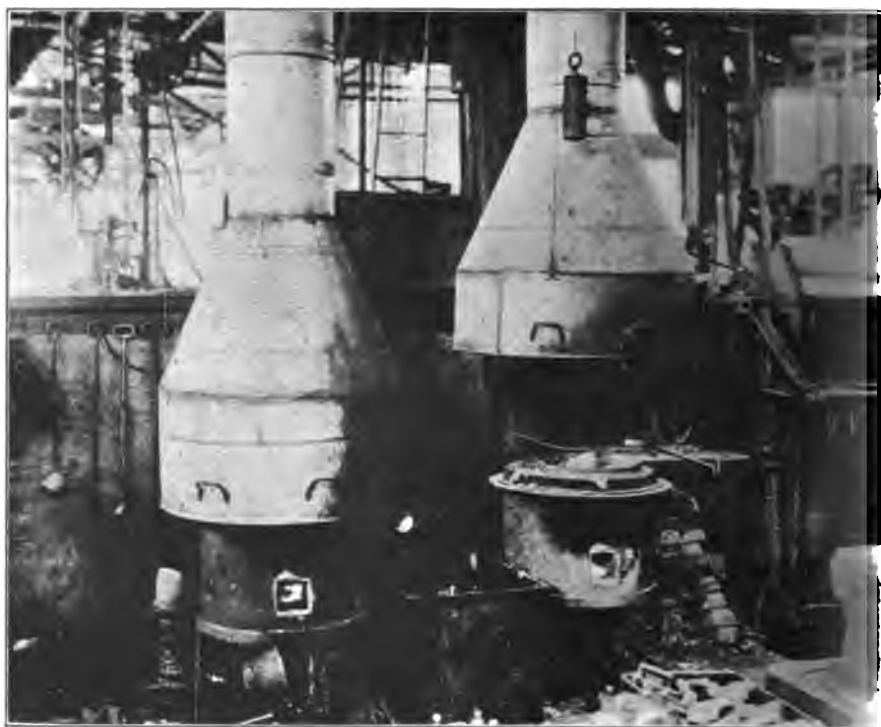


**Figure 5.**

Poorly constructed hood above Babbitt metal melting pots which failed to receive lead dross thrown off from the surface of the metal in process of dipping.

A chemical analysis was made of the wall dust, taken four feet from the bench at which the man worked. Fifty-one per cent of lead was found in the wall dust, existing as oxide, showing that the lead oxide traveled through the air from the metal pots and was deposited on the wall. It is quite evident that the man became leaded by the constant inhalation of the lead dust from

the metal pots. Figure 5 shows the original hood. The construction of two new hoods is shown in Figure 6. The base of each hood was six inches greater than the diameter of the metal melting pot; the diameter of the pipe, leading from the apex of each hood, was one-third the area of the metal surface in the pot. The stack from the hood was raised above the roof about fifteen feet, was free from interfering downward drafts and ejected eight hundred cubic feet of air per minute. The pipe immediately above the hood was of a smaller diameter than the section above



**Figure 6.**

Hoods with telescopic pipes which can be readily raised or lowered.

it which allowed the smaller portion to slip into the larger. Thus, when ladling out the metal or adding billets, the hoods, which were provided with counterweights, could be raised and lowered with ease like a window.



Hoods enclosed on all sides with glass sliding doors in front, such as are met with in laboratories, act as good means to remove fumes or gases. Where the gases or dust are of a nature detrimental to health, such as mercury vapors, hand or arm holes provided in the sliding door enables the operator to observe what he is doing, without inhaling any poisonous fumes. In all such cases, mechanical means to exhaust the air in the hood must be provided, which should not be less than one inch static suction, recorded on a "U" tube in the pipe leading from the hood. Figure 1 illustrates such a hood which can be used for many purposes, a strong suction being set up at the points where the operator places his arms.



**Figure 7.**

Hoods back of pickling vats to remove sulphuric acid fumes. The hoods are lead-lined to prevent the iron being attacked by the acid.

It often occurs that conditions are such that hoods and pipes cannot be provided above vats, pots, etc., on account of cranes or travelers being necessary. It then becomes essential to provide lateral hoods or those in which the vapors or gases are drawn into the hood, parallel to the surface of the liquid. A static suction

at such hoods in branch pipes must naturally be very strong, four or five inches being none too great for work of this kind. The width and length of the tank must be considered as well as height above the tank when the hood is placed at the back or side of the tank.

The necessity of providing hoods to remove lead dust thrown off from metal melting pots is shown in Figure 8. The dust contained in the larger tube, shown in the cut, was collected from horizontal ledges of columns and beams near the ceiling eight feet distant from a stereotype metal pot. The smaller tube shows the amount of sulphate of lead obtained from a similar amount of dust as shown in the larger tube, the lead occurring in the dust as oxide of lead. The stereotype metal pot, containing type metal, had not been provided with a hood to draw away the heated air and lead dross, thrown off from the surface of the molten type metal. In the process of adding metal to the molten mass, the surface, containing some dross, became detached and was cast upward by the heated air and deposited on beams and ceiling. Employees were engaged in the room at work the greater part of twenty-four hours, in which they unconsciously breathed the lead-laden dusty air.

#### HEAT RADIATION FROM DUCTS

Ducts leading from hoods are usually constructed of numbers sixteen to twenty-four galvanized iron, and radiate a large amount of heat into the workrooms, when conveying heated air from machines, vats, furnaces, etc. A flue measuring two feet wide by one foot high, one hundred feet in length will equal in radiating surface twelve double column radiators forty-five inches long of five square feet per section of ten sections each. Assuming the temperature of a workroom to be seventy degrees Fahrenheit, and the air in the flue to be one hundred and seventy degrees Fahrenheit, the radiation per hour would be  $170 - 70$  or one hundred degrees. As each square foot radiates about two and a half British thermal units per hour for each degree between steam and air surrounding the pipe and flue,  $100 \times 2\frac{1}{2} \times 600 = 150,000$  British thermal units are given off per hour and in ten hours or a working day 1,500,000 British thermal units. As

14,000 British thermal units are given off by burning one pound of coal,  $1,500,000 \div 14,000 = 107$  or the amount of pounds of coal required to generate as much heat as would radiate into the workroom for the above size flue in ten hours under same difference of temperatures.



**Figure 8.**

Tube containing sulphate of lead obtained from 19 grams of ceiling dust.

Thus will be seen the necessity for covering such flues with material through which the heat cannot readily radiate. Many styles of coverings and combinations of materials, used for insulating pipes and flues, are found on the market. Those in common use are mineral wool, carbonate of magnesia, cork and asbestos. Dead air being the best insulator, some form of covering should be selected having a large number of air cells, the

efficiency being proportional to number and size of air cells. As the coverings are manufactured both plastic and in sections, choice can be taken as to forms desired.

### **PAINTING BY SPRAY BRUSHES**

Painting, enameling or lacquering by means of spray brushes or atomizers, has within the last few years come into prominence to such an extent that little hand brush-work is now practiced. As all the paint ejected from the brush does not fall and adhere on the objects coated, fine spray is cast into the air, and if either the solid material or vehicle is poisonous, grave danger of poisoning may result to the operator.

Such work should be performed with an enclosed hood varying in size according to the size of the article to be coated. The conical portion of the hood should be in the direction of the flow from the spray brush, with a pipe leading from it of an area not less than one-sixteenth the cross sectional area of the hood, with a minimum air velocity of 5,800 feet per minute, corresponding to two inches static suction. It is wise when providing a fan in the pipe, to place it at a point as remote from the hood as possible, or arrange to readily detach the fan, in order to clean it of material which attaches itself to the blades.

If the pressure is too great from the spray brush, it may be necessary, to increase the static suction, to place a baffle at some point within the hood to prevent deflection of the stream of spray, or to provide a slotted pipe within the enclosed hood, placed near roof and front end of hood, connected to the exhaust fan. This often assist in the removal of the superfluous spray reflected back toward the operator.

### **SOLDERING IRONS**

The heating of soldering irons, which contain on the iron considerable solder (alloy of lead and tin), volatilizes or burns off a portion of the latter and discharges it into the workroom, which has been the cause of a number of cases of lead poisoning. Chemical tests of air for lead, existing as oxide, were made in a number of factories, where the irons were heated by gas, in which lead was found varying in quantity from .0011 grams to .0015 milligrams per cubic meter of air near the Bunsen flame.

Where a number of stoves are heated, hoods enclosed on the sides should be provided, in which there is three-quarters of an inch static suction maintained in all branches. Branch pipes three inches in diameter are of sufficient size to convey products of combination and fumes from irons, when Bunsen burners of ordinary size are used.



**Figure 9.**

Shows soldering iron properly hooded, from which a three-inch pipe leads from hood to the outer air. Sufficient aspiration is established by difference of temperature to remove products of combustion and lead dross from the iron.

### **LINOTYPE MACHINES**

The proper removal of products of combustion and oxides of antimony and lead from type-metal pots, in connection with linotype machines and monotype casters, is an important factor toward keeping the air of composing and monotype rooms ventilated and preventing lead poisoning of employees.

In the process of keeping the metal in a molten state, large quantities of heated carbon dioxide and water vapor are naturally disengaged from the burning of gas beneath the metal pots. The

movement of the plunger within the metal of linotype metal pots disturbs its surface and scatters the dross into the air. Most all metal pots of linotype machines are provided with hoods, but size, position of hood and static suction within the branches, are the principal features which determine their efficiency to remove these gases and fumes.



**Figure 10.**

Cover provided on electroplating tank with exhaust pipe at side between the surface of the liquid and top of cover.

Chemical tests of air show, when hoods are of ten inches diameter at the base, connected with three-inch branch pipes, and placed ten inches above the top of the metal pot, in which there is a static suction of three-quarters of an inch, corresponding to a velocity of 3,468 feet per minute, that no lead dust can be detected in the workroom air.

#### **WOOD WORKING MACHINES**

The removal of shavings and sawdust from the large number of machines found in wood working trades, requires the removal by downward, lateral and upward suctions. The many varieties

and sizes of machines make it impossible to set a standard design for hoods. The hood must naturally be constructed to suit the work and machine, bearing in mind that they should be so formed that the air current will catch the dust or shavings at its highest point of velocity. Hoppers or hoods of various shapes can be placed beneath saws, jointers, sandwheels and sand drums, connected to pipes of diameters according to size of machine or hopper. Hoods connected to pipes which telescope can be raised or lowered at will and are the best styles for planers, tenons and matchers. Horizontal hoods are best for floor sweeps, variety machines and sand belts. On account of the nature of the material to be moved, a velocity of not less than five thousand feet per minute, corresponding to one and one-half inches static suction in the branch pipes, should be maintained. For removal of large shavings this suction may not be sufficient to move them from certain machines, when a greater air velocity may be necessary under certain conditions.

Experience has shown that various sizes of pipes are necessary in removing wood dust and shavings from the various machines. The following table gives the size of pipes found in usual practice which are used to convey the wood dust from the machine:

Circular saws .....	5 inches in diameter
Bandsaws .....	4 inches in diameter
Shaper .....	4 inches in diameter
Sand drums, 30 inches.....	6 inches in diameter
Two cylinder sanders.....	8 inches in diameter
Three cylinder sanders.....	9 inches in diameter
Floor sweep .....	7 inches in diameter
Jointer .....	6 inches in diameter
Sand belt (according to width of belt).....	4 inches in diameter

### HOPPERS AND FITS

Hand sand-papering, scraping, certain classes of painting, dusting with powders, and sand-blasting, which require the removal of dust or fumes heavier than air, thrown off during work, can best be taken care of by a downward system of ventilation, by placing in the tables or benches a grating or wire netting under which the hopper or inverted hood is placed, to which is connected the pipe with exhaust of one-half inch static suction, corresponding to 2,864 feet of air velocity over the entire grating.

To remove sand thrown off from sand-blasting hose necessitates high air velocities. The failure which usually occurs in the

removal of the sand is due to the fact that the pits and traps which are large and often deep have a fan connection at one end, in which the air draws downward through the grating has, in many cases, sufficient suction at the portion near the fan end, but no movement of air at the remote end. This can be easily remedied by dividing the pit or hopper into several sections, leading a branch pipe from each, and connecting each with the main to which the fan is attached. In this manner each division becomes an effective portion of the entire grating. Portable covers or hoods suspended from the ceiling, arranged in such a manner as to be raised or lowered, will assist in recasting the deflecting grains of sand from the article being cleaned. A static suction of one-half inch, or more, over the entire grating will effectively remove the hard, sharp sand and particles of the material being sand-cleaned, unless the articles are of a large bulk when naturally the suction should be greater. Helmets for dust protection, worn by operators, are necessary in connection with this dangerous work.

Small hoods of various sizes are necessary to remove dust created in many processes, carried on at machines and on tables and benches. In all such cases, to obtain the best results the hood must be placed as near the work as possible, have a sectional area not more than sixteen times that of the pipe and have a minimum two-inch static suction within the pipe, leading from the hood.

Effective covers can be provided on vats from which vapors and gases can be very readily prevented from entering the room, by an exhaust pipe at one side between the surface of the liquid and the cover. The cover can be made in sliding sections as in Figure 10. Six-inch pipes with two-inch suction will usually suffice for vats of ten square feet, but this must be governed by the material and action within it.

#### PIPE CONSTRUCTION

The arrangement of pipes connected to hoods should be such as to facilitate the movement of air from the machine or device with as little resistance as possible.

The area of any main duct, into which any number of branch pipes enter, should not be less, at any place in it, than the combined areas of the branches entering it, plus twenty per cent. No



branches from any hood should enter the main duct at an angle greater than 45 degrees. Laps in mains and branches should be made in the direction of the flow of the air. Hand holes, with tight fitting sliding covers ten feet apart, should be provided when solid material may become lodged and obstruct the air flow. Elbows should be constructed with a radius in throat, equal to twice the pipe's diameter. Branch pipes, entering a main, should not enter the main duct directly opposite one another. Where a large number of hoods are connected to a main, dampers should be provided to shut off any branch when not in use.



**Figure 11.**  
Proper method of sand blasting.

Care should be exercised that fumes or gases from different hoods entering a common main do not chemically react on each other and form explosive mixtures.

Acid vapors, such as sulphuric, hydrochloric, hydrofluoric, etc., readily attack iron ducts, and, when of such strength as to destroy the material of which the hoods are made, lead linings can be provided; hoods can be constructed of wood, pitched and joined together with wood screws, where nails or screws would corrode.

## Previous Publications Concerning Occupational Diseases

Statistics of occupational diseases reportable by physicians to the Department of Labor appeared in the quarterly Bulletin during the years 1912-1913 (number 50-56 inclusive). The annual report of the Department for 1915 summarizes reported cases down to August of that year.

Beginning with 1908, the annual reports of the Medical Inspector of Factories, appearing in the annual reports of the Department, have contained reports upon, and discussions of, occupational diseases in New York State. Included in these reports are accounts of the following special investigations of particular industries, together with proposed regulations for their conduct:

Bakeries in Manhattan borough, 1909, pp. 88-89.  
Calico print industry, 1909, pp. 80-88 (this account appeared also in Bulletin No. 41).  
Cloak and suit industry in New York City, 1911, pp. 87-96.  
Felt hat industry, 1911, pp. 57-67.  
Pearl buttons, 1910, pp. 98-103.  
Phosphorus matches, 1910, pp. 83-98.  
Potteries, 1909, pp. 100-112.

The following special reports on ventilation have also appeared in the reports of the Medical Inspector:

Results of air analyses in certain factories, 1910, pp. 104-111.  
Results of air analyses in cloak and suit factories in New York City and in the felt hat industry, 1911, pp. 108-133.  
Ventilation of factories, 1908, pp. 65-94.  
Ventilation of a department store, 1911, pp. 83-86.

Other material published includes the following:

Sanitary Conditions in the Printing Trade (82 pp.). Annual Report of Bureau of Labor Statistics, 1906, pp. lxxi-cxli.  
Health of Printers (8 pp.). Bulletin No. 33, 1907, pp. 253-265.  
An English Report on Physical Deterioration (8 pp.). Bulletin No. 30, 1906, pp. 372-379.  
Special Rules and Regulations Adopted by the British Government for the Regulation of Certain Dangerous Trades (47 pp.). Annual Report of Bureau of Labor Statistics, 1906, pp. 833-879.  
The Dangerous Trades in England (4 pp.). Bulletin No. 33, 1907, pp. 255-258.  
Poisoning by Wood Alcohol Fumes from Brewers' Varnish. Bulletin No. 51, pp. 130-137. Also printed separately.  
Lead Poisoning Eliminated in a Factory (relates to protection against dust in the sand-papering of castings). Bulletin No. 54, pp. 64-70.  
Anthrax in Woolen Mills and Tanneries. Bulletin No. 56, pp. 402-5.  
Chrome and Lime Sores in Tanneries. Bulletin No. 56, pp. 405-6.  
Advice to Workmen for Prevention of Lead Poisoning (cards for distribution to workers, printed in English, German, Italian, Hungarian, Polish and Yiddish).  
The Reporting of Industrial Diseases (small pamphlet containing the reporting law, explanation of purpose of reporting, and lists of diseases and harmful substances).  
European Regulations for Prevention of Occupational Diseases. Special Bulletin No. 76 (77 pp.).  
Anthrax. Special Bulletin No. 79 (22 pp.).  
Hoods for Removing Dust, Fumes and Gases. Special Bulletin No. 82 (23 pp.).

Of the publications above referred to, files of which may be found in many public libraries, the Department can supply only the Annual Report of the Commissioner of Labor for 1909 and 1910, Bulletins 51 and 54, reprints of the article on wood alcohol in Bulletin 51, the cards concerning lead poisoning, and Special Bulletins, 76, 79 and 82.



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**DANGERS IN MANUFACTURE OF**  
**PARIS GREEN AND SCHEELE'S GREEN**

Prepared by  
**THE DIVISION OF INDUSTRIAL HYGIENE**



## DANGERS IN THE MANUFACTURE OF PARIS GREEN AND SCHEELE'S GREEN

Paris green and its poisonous qualities have been known for many years to almost every man, woman and child. Many persons unfamiliar with the pigments and dyes which are now employed for coloring food, printing on wall paper, dyeing of textiles, and colors used in paint manufacturing, are under the impression that these articles when colored green contain Paris green.

This material is now chiefly used as an insecticide for destroying potato bugs and other insects, and on account of the cost of raw material it is little used for any other purpose. Formerly, this material was extensively employed in the manufacture of green paint, for when ground in oil it produced a paint of extreme brilliancy.

In its manufacture, which is carried on in this State to a considerable degree, fully one thousand tons being annually produced, additional precautions are necessary beyond those given in the Labor Law to guard against cases of industrial poisoning. Considerable illness has been found to exist among many of the workers engaged in its production, which is due in a measure to lack of knowledge among those engaged in its preparation, and a disregard of the extremely poisonous qualities which this salt possesses.

Inasmuch as the workers are unacquainted with its dangerous and poisonous properties, many cases of arsenical poisoning are not discovered, because as soon as a slight irritation of the skin develops, or nausea occurs, the men leave the industry and the labor engaged therein is constantly shifting.

### HISTORY

According to Desamle and Pierron, Paris green was first discovered in the year 1712 by Russ and Sattler in Schweinfurth, Bavaria, Germany, from basic verdigris and arsenic. According to others, Voumītis of Vienna, Austria, was the first manufacturer; Liebig published the manufacturing process in 1822, and in 1872 its manufacture was undertaken in Brooklyn, N. Y.

The striking bright shade and popularity of this material has led to its manufacture by nearly all color makers, which is the cause of the various names under which it is known besides that of Paris green;

such names as "Emperor Green," "New Green," "Mineral Green," "Original Green," and "Patent Green" were given to it by the various makers. The object of this, no doubt, was to lead the public to believe that the so-called colors were not of a poisonous nature.

These colors or tints were produced by mixing Paris green with barytes, chromate of lead, china clay and other white mixtures, thus lowering the cost of manufacture. "Scheele's Green" is the name given to the commercial product, used as an insecticide, which is manufactured in one establishment in the State. The original method of its manufacture has been kept a strict secret. In an attempt to manufacture Paris green, it was discovered by C. W. Scheele in 1742, a native German chemist who resided in Sweden, that a substance could be produced which greatly resembled Paris green and could be manufactured at a less cost. To this substance the name "Scheele's Green" was applied, by which it is still known.

#### EXTENT OF MANUFACTURE

Paris green and Scheele's green are manufactured by ten firms in the United States, of which seven firms are located in the State of New York, only six of which were actually making the material when this investigation was conducted. Five of the firms were located in the City of New York and one up-state, the latter confining its product to Scheele's green and kalsomines. All of the factories engaged in the production of these substances, manufacture other compounds, such as dry colors, paints, crayons, bleaching solutions, dyes and other chemicals, no factory being entirely devoted to the exclusive production of these articles. The amount manufactured varies with the demand, the largest factories turning out about two hundred tons each during their season, which is principally a period of about six months during the fall and winter.

#### PHYSICAL PROPERTIES

Paris green, also known as "Schweinfurter Green," "Meadow Green," "Parrott Green," and "English Green," is a cupric, acetoarsenite, having the formula  $\text{Cu}(\text{C}_2\text{H}_3\text{O}_2)_2 \cdot 3\text{CuAs}_2\text{O}_4$ , and is an exceedingly poisonous double salt, insoluble in water. In contact with organic matter it changes somewhat. Many micro-organisms and fungi act upon the compound and produce arseniuretted hydrogen, which no doubt causes the arsenical ulcers found on workers engaged

in preparing the material. The gas evolved being soluble in water readily attacks the skin, also the eyes, nose, throat and lungs, which are more susceptible to its action than to the simple mechanical action of the pigment. The fine powder attacks the skin, but its most intense effect is found in those regions of the body where perspiration is present at most times.

Scheele's green, known as "Arsenite of Copper," also "Hydro-Cupric Arsenite," "Mineral Green," and "Swedish Green," is composed of acid arsenite of copper and is represented by the formula  $\text{CuHASO}_3$ . It has a strikingly fine light green color, formerly used in calico printing and as a pigment for green wall paper. It is insoluble in water, but dissolves in excess of alkalis or acids. It is very poisonous and like Paris green is capable of producing severe ulcers on the skin, severe irritation of the mucous membranes of the eyes, nose and throat, and gastro-intestinal irritation. Its use is principally as an insecticide.

Chronic arsenical poisoning is a condition to which most of the men are exposed. Acute pains in the abdomen, nausea and intense thirst are first noticed. This is followed later by gastritis, enteritis, jaundice and diarrhoea, followed by constipation. There is a loss of nails, large ulcers develop, and the skin seems to be somewhat mummified. In intense cases death sometimes results.

Paris green is manufactured by dissolving in wooden tubs a quantity of sulphate of copper in hot or cold water, adding to it acetic acid, and heating the solution to form cupric acetate. In another tub arsenious acid is dissolved in a boiling solution of sodium carbonate, which usually takes about an hour, the proportions being added in such an amount as to obtain arsenite of soda. These tanks are usually hooded to carry away the vapors formed. The solution is added to the cupric acetate solution and stirred while hot. Mechanical means are used in some cases, but the old style hand method is principally practiced. An olive green precipitate of cupric aceto-arsenite results. Should a yellow-green precipitate be produced in the course of boiling, a little acetic acid is added, the solution is boiled a little longer and the liquid allowed to settle. The water solution is run off and the precipitate washed with several changes of water. (This last step is not practiced by some firms.) The resultant precipitate is shoveled out on filters and allowed to drain. When the draining is finished it is again shoveled on drying trays. These are placed in a drying room

or drying closet, and when dried the material is dumped into chutes or hoppers which convey it to crushing rolls, then sifted, transferred to the bolter and finally filled into kegs, barrels or cans, either by hand-filling with a shovel or scoop, or from a hose-spout from the bolter, and in the case of small cans in one factory by means of an automatic weighing machine.



Figure 1

Drying oven, equipped with mechanical draft. Employees are not obliged to enter, thus preventing the inhalation of Paris green dust. This process takes but one day as compared with the old method of drying for three or four days in a drying-room.

Scheele's green is manufactured by adding to a solution of sulphate of copper a solution of arsenite of soda as long as the green precipitate forms, which is washed with water, and the water solution is drained off. The material is shoveled from the vat onto drying trays, placed in a wooden dryer and when dry placed in a bin and shoveled out into a tumbler with other ingredients to make the patent insecticide, in



which but one per cent of the pigment is an active part. The manufacture of this substance is carried on in but one factory. The packing is performed in a separate room by an obsolete method of scooping up from the large receptacles into the smaller boxes. The room in which this work is performed is not provided with any means of mechanical ventilation.



**Figure 2**

Illustrates arsenical ulcer and oedema of the hand of Paris green worker.

The method of production in each factory varies somewhat in handling. For instance, one factory does not wash the finished precipitate of Paris green, while another performs this task; drying is done in one factory in a large room which takes more than three to four days, while in another it is done in twenty-four hours. In one, employees are obliged to enter the dry room, which often has a temperature of 140° F., to carry in and out the trays containing the product; another has separate drying ovens, each arranged with a damper so that the flow of hot air which circulates throughout the oven can be stopped, thus preventing the heat and dust from being blown into the workroom.

The dumping of the trays containing material into the chute leading to a bolter is done in one factory without a hood enclosure to occlude the fine Paris green dust, while in another it is placed on the tumbler, which is turned upside down, and surrounded by a hood or a closet, to which is attached an exhaust pipe with a static suction of one-half inch. Another has no pipe but a sliding door in the enclosure which is closed by the operator before turning over the trays to be dumped. In the last case, Paris green sifts out of the door when it is opened to put in the next tray, and workmen usually inhale a considerable amount of the dust.



**Figure 3**

Automatic weighing machine with exhaust connection, wherein little handling of the boxes is necessary by the operator.

Filling boxes by hand is resorted to in most all the factories. The material is scooped out of the receptacles or barrels with small shovels. Barrel-filling is performed directly from the tumbler through a hose connection, reliefs from the barrel being provided by a small pipe, in which the dust and air contained within the barrel are led back to the

tumbler, thus preventing the same from entering the workroom. Some of the firms do not take this precaution. Mechanical weighing and filling of one and two pound boxes are performed in one factory with good results. The machine, made by an automatic weighing machine company, has attached to it exhaust pipes so placed as to remove the greater part of the dust generated.



**Figure 4**

Shows operator engaged in the process of box filling by hand; note respirator, ear, head, nose and throat protection.

Label pasting is done under small hoods in one factory but in all others no hoods are provided. The hoods shown in Figure 5 illustrate their inefficiency for the reason that they are placed too high above the table.

It appears to be the prevailing opinion that the fine dust of Paris green cannot be controlled and that it will continue to be liberated at all points. Another important factor is the lack of knowledge by the workers of its poisonous properties.

It is useless to provide a well equipped room in which employees may take their meals if the material is tracked into the room on shoes of workmen and the floor seldom cleaned. In some factories single lockers are provided for employees in which old clothing and street clothing are hung together, thereby dust from the working clothes is shaken into the street clothes.



**Figure 5**

Illustrates small hoods, designed to remove Paris green dust, released in handling the filled boxes. The hoods being placed too high above the pasting tables, are inefficient.

If walls, though white-washed in accordance with law, are allowed to contain Paris green powder; if disregard is shown in placing trays containing Paris green and Scheele's green near windows through which a draft blows, whereby material is scattered to all parts of the factory; if respirators are provided by the firms which are allowed to get dirty and the meshes clogged with the Paris green powder; or if the under clothes which the men wear are dried in rooms with Paris green, the necessity of stringent educational methods with the workmen and proprietors is indicated.

## FACTORY No. 1

The manufacture of Paris green in this establishment is conducted entirely in the basement of a six-story fireproof building. It is well ventilated by natural means, windows being located on two sides of the factory. The floors are kept in fairly good condition. The men are provided with a linen headpiece, facepiece, together with cotton waste and overalls, which are made to tie at the wrists and ankles. All men use gloves and high shoes which they provide themselves. No hot water, soap or towels were furnished.

In the method of drying, this factory obviates by the use of the American blower system the necessity of men entering the dry room. The drying racks are placed on cars and pushed into a tunnel which is heated by surplus steam from the boilers. As each car is brought in, it moves the other ahead, and at the end of seven days the first car reaches the end of the tunnel where it is placed on a transfer car and prepared for bolting.

The bolting, sifting and packing are carried on in the same room, the floors, walls and ceiling of which are thickly covered with Paris green. An exhaust system, located under the packing table, disposes of small quantities only of the dust. Within the bolting room, there is an engine with a swiftly running belt. This belt serves to keep large quantities of Paris green dust in constant motion.

To place the dry pigment in the tumbler, the worker is required to mount six steps of a movable platform, carrying the tray above his head and then throwing it into the dumper. This operation is also accompanied by large quantities of dust entering the atmosphere. In barrelling and package filling much dust is also created.

Ten men are employed, of which seven were examined:

S. P., 24 years of age, engaged for 3 years in the industry, showed a marked conjunctivitis.

S. C., 27 years old, engaged in the industry for 3 years, showed a conjunctivitis and scars of ulcers on legs and hands.

J. D., 29 years of age, negative.

W. S., 24 years old, 1 month in the industry; this man showed a large nasty looking ulcer, located on the right side of the lip, and extending into the nasal cavity. The septum was involved and it is probable that this will cause a perforation.

F. B., 24 years old, 4 years in the industry, negative.

M. O., 50 years old, 1 month in the industry, shows a slight nasal irritation.

E. W., 41 years old, 5 years in the industry, shows a marked conjunctivitis and slight anaemia.

## FACTORY No. 2

This factory is a four-story non-fireproof building devoted almost entirely to the manufacture of Paris green. It is ventilated by doors

and windows. In this plant little that is favorable can be said in regard to guarding the health of the employees. The floors, walls, ceiling, stairs and halls of the building are covered with deep layers of Paris green dust. Each footstep raised a quantity of dust from either the floor or the stair tread. In the vat room and package filling room, owing to poor drainage, Paris green in connection with water formed a pasty mass covering the greater part of the floor.

The pigment in pulp form is taken in barrels from the tank room on the ground to the fourth floor and then placed in the drying room. The worker must pass through the drying room each time he goes to the tumbler, and while batches are being tumbled the door between the dry room and tumbling room is always open. The drying tray is dumped in and large quantities of dust result. In this plant, the bolting is carried out in the same room as the tumbling and, while the bolter is in motion, large clouds of dust are produced completely enveloping the worker at the tumbling machine.

Men were found eating in a small wash room which had no window and which was in a very dirty condition. These men, who were not provided with any headpieces, overalls, masks, hot water, soap or towels, had no realization of the dangerous material handled or its means of entry into the body.

Barrel and package filling also gave rise to large quantities of dust; women were engaged in labeling and no protective clothing was provided for them. Fifteen men and two women were employed in this factory and seven were examined:

K. S., age (?), employed 25 years, showed a marked anaemia due to arsenic.

M. C., age (?), employed two months, negative.

Wm. L., 36 years old, employed about six weeks, has had an attack of furunculosis due to Paris green.

J. W., 30 years, employed four months, negative.

O. C., 22 years old, employed two weeks, has had an attack of furunculosis on arm and ulcers on fingers.

E. G., 26 years old, employed two months, shows scars of ulcerations on the arms.

J. S., age (?), employed 19 years, has recurrent attacks of furunculosis.

### FACTORY No. 3

The manufacture of Paris green in this plant is conducted on the first floor of a three-story non-fireproof building and ventilated by means of doors and windows. The packing and filling are performed on the second floor of a two-story building located on the opposite side of the street. Floors, walls and ceilings are deeply covered with Paris green dust.

The vat room, which has a well drained floor, also contains the drying ovens and tumbler. The pulp is taken directly from the filters to the drying tray, and then placed within the oven where it is allowed to remain about twenty-four hours. The worker in this instance is in no way affected by the high temperature necessary for drying. Perspiration, for which Paris green shows a remarkable affinity, is also eliminated.

The dried green is taken to the tumbler, which in this instance is fairly tight, and then conveyed to the bolter by a conveyor belt. Keg and barrel filling are carried on by gravity method, and here considerable dust is created with no means for its disposal.

The small room for package filling is in no way suited for that class of work; the only means of ventilation provided is from a skylight about fifteen feet above the packing table and in extremely cold weather, rain or snow, it must of necessity be kept closed, thus absolutely forcing the packer to remain in an atmosphere surcharged with Paris green dust.

In this plant, the small package packer and the bolter tender are the only ones using sufficient precautions to avoid arsenical poisoning; both of these men cover themselves thoroughly, wear gloves, use muslin respirators and are cleanly in their habits; other men employed take no such precautions.

Hot water, soap and towels are provided and a lunch room is under construction. In this plant a physician is employed for the treatment of ill workers; visits are regularly made by him to the factory and cases are recognized early.

Eleven men were employed, of which six were examined:

J. F., 26 years old, has been employed in the plant three months. Five weeks ago, he began to have a slight itching along the upper third of the inner surface of the leg. This gradually became worse, and at the present time, there are large superficial ulcerations about five inches in diameter. In addition he has a conjunctivitis and soreness of lumbar muscles.

M. R., 27 years old, employed for three and a half months. There is a slight irritation of the conjunctiva present.

S. G., 45 years old, has been employed for three and a half months; for the past three weeks, he has had a most intense irritation on the upper inner third of both legs. He is undergoing treatment at the present time.

B. F., 49 years old, has been engaged as a packer of Paris green for 25 years. Examinations show a chronic conjunctivitis, together with the same leg irritation noted in other cases.

S. G., 48 years old, employed three weeks; no signs noted.

S. S., 56 years old, has been engaged in the trade for 30 years. He has never had any illness resulting from his occupation. This man takes the utmost care of his personal hygiene, washes carefully at the plant, and bathes at his home daily.

## FACTORY No. 4

This plant has its tank room located on the top floor of a three-story non-fireproof building and is ventilated by natural means, doors and windows. A large excess of steam is produced and there is not sufficient means of ventilation to dispose of it. The ceiling is dripping freely from condensation while the floor is poorly drained. The drying room is located on the same floor and the drying trays are carried in and out.

When dried, the Paris green is placed in the tumbler and dropped by gravity into the bolter and sifter. This process creates a fairly large quantity of dust.

The barrel and small keg filling department is located on the ground floor. Filling is done directly from the sifter by a hose connection: this filling is markedly dusty.

Small package filling is conducted on the ground floor of a separate building located some distance from the main building. In this plant, there is in operation the only automatic package filling machine at present in use. It is connected with an exhaust system which disposes of the greater part of the dust produced. With a few minor alterations this machine would be entirely dust-proof and one of the sources of poison removed. A system of exhaust at the labeling tables is in operation, but inasmuch as the hoods are located high above the tables, it is almost useless. A well-equipped wash room is in use and lockers, hot water, soap, and towels are provided.

Fourteen men were employed and eleven were examined:

S. B., age (?), has been employed two years, negative.

M. M., 47 years old, employed five years, negative.

J. K., 26 years old, employed four months. Has had no signs of illness, but he shows a slight anaemia.

J. W., 43 years old, employed 15 years, negative.

J. W., 26 years old, employed four months, negative.

W. K., 28 years old, has been employed in the plant about seven years, and has also worked in chromes; he shows marked paleness of the skin, and blanched mucous membranes.

W. S., 36 years old, has been employed for about six years, negative.

S. G., 26 years old, has been employed five months; examination shows an ulceration on the internal surface of the fourth finger of the left hand. There is also a conjunctivitis.

J. McC., 59 years old, has worked in Paris green manufacture 17 years, and at paints in general 40 years. Has had no symptoms attributable to his occupation. Physical examination shows a marked anaemia.

F. O., 22 years old, has been employed four months. Shows conjunctivitis.

J. M., 35 years old, employed one month, negative.

J. K., 40 years old, employed six months, negative.



**FACTORY No. 5**

The tank room of this plant is located on the third floor of a three-story non-fireproof building ventilated by means of doors, windows and skylights; poorly drained and the walls and ceilings are covered with Paris green dust, due to the fact that dumping into the bolter is carried on upon the same floor. The dumper is a barrel-shaped affair, and as each dry tray is turned therein clouds of Paris green dust issue therefrom and no means are taken for its control. The dry room is located on the same floor and men are required to carry the trays in and out of the room.

The material is carried by gravity to the bolter and sifter which is located on the ground floor. The barrel filling is carried on in the same room and the men are required to enter while the bolting and sifting is going on amidst large clouds of dense dust. Small package filling is carried on directly at the barrel with a makeshift exhaust system of absolutely no practical value. Here the floors are covered deep with Paris green dust. Neither hot water, soap or towels are provided, nor is any protective device used.

Seven men were employed and all were examined:

- S. O., 38 years old, employed 15 years, negative.
- N. Q., 37 years old, employed 14 years, negative.
- G. S., 50 years old, employed 8 years, shows a chronic conjunctivitis.
- L. W., 25 years old, employed 1 year, negative.
- M. H., 37 years old, employed 14 years, complains of having recurrent ulceration.

**FACTORY No. 6**

This plant is a two-story non-fireproof building in which five or six men are employed manufacturing Scheele's green, which is used only in connection with other substances for the production of a secret insecticide.

A portion of the second floor is devoted to the settling tanks, and is ventilated by doors, windows and skylight.

The pulp is drained and carried to the first floor where it is placed in the drying room; when dried it is again carried to the second floor and there dumped in storage bins to be used as required.

In the mixing process, in which Scheele's green is added to other substances, large quantities of dust are produced and no means is adopted for its control. It is allowed to flow into barrels and here also a dusty condition results.

In the package filling room, the process is similar to that in other factories. The dust is present at all points and the floors and walls are covered with the insecticide.

No hot water, soap or towels, nor dressing room is provided. Six men were examined:

H. C., 36 years old, employed two years, shows a slight anaemia.

G. M., 26 years old, employed three months. Acute conjunctivitis.

A. H., 20 years old, employed five years; during the past two years, he has had two attacks of intense ulceration in upper inner surface of legs.

G. A., 45 years old, employed 3 years; has had facial ulcerations at different times and also on both legs.

M. P., 44 years old, employed six months; has had ulceration on face.

G. C., 16 years old, employed six months, complains of a nasal irritation when handling the Paris green.

In these plants orders were issued wherever the Labor Law was applicable against all conditions found to be detrimental to health. These orders related to the prohibition of eating within the factory; cleanliness of floors, walls and ceilings; providing running hot water, soap and individual towels; installing exhaust systems to dispose of the dust created in the process of manufacture; suitable place in which to eat meals; and suitable means to remove dust from the floors.

#### ANALYTICAL DETERMINATIONS

A chemical analysis was made of air in one of the packing rooms where filling of boxes from barrels was performed. Three hundred and five milligrams of the Paris green were found per cubic meter of air at 60° F. This material occurring in the air was generated in the process of hand filling, blown off the walls and ceiling and stirred up from the floor in the act of walking. A proper method of weighing and filling under enclosed hoods, clean walls and floors would have eliminated this large amount of dust.

Samples of underclothing were analyzed and found to contain 1.1 milligram of Paris green in a piece measuring six square inches.

#### NOTICE OF DANGERS

Printed notices furnished by the Department of Labor of the State Industrial Commission and reading as follows should be posted in every room where Paris green is handled:

#### RECOMMENDATIONS TO EMPLOYEES

Paris green is a dangerous poison. Sickness results from breathing air containing it, from its reception through broken skin and through the mouth.

Don't hang any clothes to be dried in the dry room.

Don't leave the factory in the clothes in which you work.

Don't place your factory clothes in the same locker with street clothes.

Don't eat in or about the factory except in provided lunchroom.

Don't eat before you have washed your face and hands with hot water and soap.

Don't scratch or touch any part of your body before you have washed your hands.

Don't sweep the floor with a broom.

Don't plug your nose with cotton; tie clean cotton waste over nose and mouth.

Keep your gloves clean on the inside.

Take a complete bath at home daily.

Drink milk instead of beer or whiskey.

Tie clean cotton waste, twice daily, over nose and mouth as this is the easiest and best respirator.

Try to keep down dust as much as possible by closing doors carefully and keeping the dust off the floor as much as possible.

Keep your hair, mustache, and finger nails short to prevent the Paris green from settling in them.

### RECOMMENDATIONS TO EMPLOYER

Provide double lockers for men engaged in Paris green manufacture.

Sweep all floors and keep ceiling and walls of workroom, halls, stairs and lunchroom free from Paris green dust by using a vacuum sweeper.

Provide periodical medical examinations for men engaged in the production of Paris green and Scheele's green.

Provide overalls, head and neck pieces of unbleached muslin, and gloves for Paris green workers and have same washed weekly.

Provide clean cotton waste as respirator for all Paris green workers.

Not less than one hour should be permitted for noon-day meal.

It is suggested to the State Industrial Commission that the recommendations here made and which are not covered by law, be enacted into a code in order that this industry be freed from the many dangerous conditions which now surround it.

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## Previous Publications Concerning New York Labor Laws

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Compilations and reviews of the laws enacted in individual years similar to those in this Bulletin have been published as follows:

1886 and 1887 — In annual report of Bureau of Labor Statistics for 1887.

1888, 1889, 1890 — In annual report of Bureau of Labor Statistics for 1889.

1898, 1899, 1900 — In annual reports of Bureau of Labor Statistics for each of those years.

1899 to 1913 — In June Bulletins of each year except 1911 when they appeared in the September Bulletin. Similar compilations and reviews were published also in the report of the Commissioner of Labor for 1903 and 1904.

1914 — In Bulletin No. 62.

1915 — In Bulletin No. 72.

1916 — In Bulletin No. 78.

Bills relating to labor introduced in the Legislature were reprinted for 1903 and 1904, and indexed as in this Bulletin for 1905 to 1913, in the reports of the Commissioner of Labor for those years except 1913 when the index was published in the June Bulletin. The index for 1914 was published in Bulletin No. 62, for 1915 in Bulletin No. 72, and that for 1916 in Bulletin No. 78.

Compilations of all New York labor laws in force have been published as follows:

1884, 1895, 1897 — In annual reports of Bureau of Labor Statistics for those years.

1902 — In annual report of the Bureau of Labor Statistics for 1901.

1905 to 1914 — In annual reports of the Commissioner of Labor. These compilations were partly annotated.

A historical review of Labor Legislation in New York, by A. F. Weber, was published as a separate monograph (30 pp.) in 1904.

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Of the above publications, files of which may be found in many public libraries, the Department can now supply *only* the following:

*Annual reports of Commissioner of Labor:* 1903-05, 1907, 1910, 1913 and 1915.

*Bulletins:* June, 1908; September, 1911; June, 1912; and No. 78.



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DEPARTMENT OF LABOR  
**SPECIAL BULLETIN**

Issued Under the Direction of  
**THE INDUSTRIAL COMMISSION**

**JOHN MITCHELL**, Chairman  
**EDWARD P. LYON**                      **JAMES M. LYNCH**  
**LOUIS WIARD**                         **HENRY D. SAYER**

**No. 84**  
**June, 1917**

**NEW YORK LABOR LAWS  
OF 1917**

Prepared by  
**THE BUREAU OF STATISTICS AND INFORMATION**

# THE LABOR LAWS OF 1917

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## THE LABOR LAWS OF 1917

### GENERAL REVIEW

The text of the labor legislation and other legislation relating to labor enacted in New York State in 1917 is reproduced in the following pages. The changes made in existing statutes are indicated by italic type in the case of additions, and by enclosure in brackets in the case of omissions. Preceding the text of the laws appear the recommendations as to workmen's compensation made by the Governor to the Legislature in his annual message.

Of the twenty laws contained in this Bulletin, nine amend the Labor Law proper, and one the Workmen's Compensation Law. The remaining laws amend statutes other than the Labor Law or Compensation Law but have to do either directly or indirectly with labor. In each instance, the statute amended is indicated below.

#### Workmen's Compensation

Two laws, chapters 705 and 772, reproduced here, relate to compensation for workmen's injuries; one pertains to actions for state fund premiums, the other amends the Workmen's Compensation Law in various and important particulars.

Three other laws, chapters 264, 298 and 299, not reproduced here, amended provisions of the Insurance Law that relate to corporations carrying compensation insurance. Chapter 298 prescribed the method of computing casualty or surety insurance corporation reserves. Chapters 264 and 299 apply only to mutual employers' liability and workmen's compensation insurance corporations, chapter 264 fixing minimum surplus when the corporation transacts other than employers' liability and workmen's compensation insurance and chapter 299 authorizing and regulating mergers.

*General Amendatory Act.* Chapter 705, amendatory of the Workmen's Compensation Law, briefly summarized: (1) Brings more than a score of additional employments within the law's coverage; (2) Broadens the scope of the group provision governing

explosives and dangerous chemicals to include not only their manufacture but their storage or handling; (3) Extends the definition of "employment" to employment "in connection with" as well as "in" occupations carried on for pecuniary gain; (4) Gives death benefits to illegitimate children, acknowledged and dependent; (5) Makes injuries incurred in repairing plants, buildings, grounds and approaches of places where hazardous employments are carried on compensatable; (6) Dates compensation from the day of disability, instead of the fourteenth day after disability, if the disability lasts more than forty-nine days; (7) Permits compensation intermediate or proportionate in amount between compensation for loss of two or more digits and compensation for total loss of hand or foot; (8) Permits proportionate compensation, likewise, for partial loss or partial loss of use of hand, arm, foot, leg or eye; (9) Limits the requirement that the Commission prepare statements of its conclusions of fact and rulings of law to cases appealed to the courts; (10) Gives employers insured in the state fund the right to appeal from the Commission's rulings; (11) Permits the Commission to certify questions to the Appellate Division upon its own motion as well as upon application of either party; (12) Makes awards affirmed by the courts interest-bearing from date of the Commission's action; (13) Gives the Commission clear and unconditional power to require insurance carriers and employers to pay into the state fund the present value of death benefits and of compensation awards for one hundred and four weeks or more for total permanent or permanent partial disability, computation to be made upon the survivorship annuitants' table of mortality and the remarriage tables of the Dutch Royal Insurance Institution, with interest at three and one-half per cent per year, and the proceeds to be invested in life insurance company securities; (14) Makes the awarding of compensation in a third party case an automatic assignment of the employee's cause of action to his employer or insurance carrier; and (15) Establishes twelve instead of six months as the period for readjusting insurance premiums.

*State Fund Premiums.* Chapter 772 amended the Code of Civil Procedure so as to give justices of the peace cognizance of a civil action for a premium due the state insurance fund where such premium does not exceed two hundred dollars.

### Safety

Four measures, amendatory of the Labor Law, were enacted relating to safety. These deal with elevators, explosives, fire alarm signal systems and factory exits. Another statute amended the Railroad Law relative to locomotives.

*Guarding of Elevators.* Section 79, subdivision 2, was amended by eliminating the requirement that counterweights of elevators be protected by enclosures at the top and bottom of the run, where in the judgment of the Industrial Commission such enclosures are unnecessary. The requirement that elevator cars be properly lighted "at all times" was changed to "during working hours or when in use."

*Explosives.* By chapter 629, a new section — 235-a — was added to Article 15-A of the Labor Law which deals with explosives. The Governor of the State was given power "in time of war" to prepare and promulgate regulations governing the manufacture, distribution, storage and use of explosives. The same act rendered discretionary with, instead of mandatory upon, the Industrial Commission the issuance of a license for the storage of explosives to one who has complied with the provisions of Article 15-A. An obligation was laid upon the owner of any licensed magazine to report immediately to the Industrial Commission any change in the physical conditions surrounding the magazine. The license shall then be canceled or modified in accordance with the changed conditions.

*Fire Alarm Signal Systems.* Chapter 634 amended section 83-a by transferring authority over the number, character, location and installation of fire alarm signal systems in New York City factories from the Industrial Commission to the Board of Standards and Appeals of New York City. This board was created by chapter 503, Laws of 1916. Elsewhere in the State, the Industrial Commission retains this authority.

*Factory Floor Areas and Exits.* Chapter 721 amended section 79-a, subdivision 2, of the Labor Law by providing that any point in the floor of a sprinklered factory building may be used as far as one hundred and fifty, instead of one hundred, feet from an exit and that, where a floor area exceeds five thousand square feet, one exit shall be added for each additional five thousand square feet

instead of each additional "five thousand square feet or part thereof," except that the Industrial Commission may prescribe otherwise.

*Doors on Locomotive Fire Boxes.* Chapter 370 amended section 77 of the Railroad Law by requiring that railroads must equip their locomotive fire boxes with doors which the firemen can open by pressure of the foot on a push button or other appliance. The law does not apply to locomotives having mechanical stokers or moving across the State line to or from repair shops for repair purposes only. New locomotives must have such doors from May 5, 1917; locomotives in service may operate without them until withdrawn for repair; other locomotives must be equipped with them from and after January 1, 1919.

#### Child Labor

Of the four laws relating to child labor two amended the Labor Law with reference to the issuance of employment certificates and juvenile departments in the State employment offices, and two amended the Education Law with reference to compulsory education.

*Employment Certificates.* Amendments to the Labor Law effected by chapter 536 require local health authorities to forward each month to the State Industrial Commission statistics of evidence accepted in granting children's employment certificates and to furnish each week to their local school superintendents the names and addresses of children granted or refused certificates, together with the reasons for refusals; the amendments also require the Industrial Commission to send each month to the local school superintendents the names and addresses of children whom its inspectors have found illegally working in factories, mercantile establishments, etc.

*Compulsory Education.* Chapter 563 amended the Education Law by lengthening the school year to one hundred and eighty, instead of one hundred and sixty days, obliging parents or guardians whose children do not attend school where such parents or guardians reside to furnish satisfactory proof of attendance elsewhere, conformed the educational standards of the school record certificate to those of the employment certificate, as modified by L. 1916, ch. 563, amendatory of the Labor Law, and provided for confinement

in truant or equivalent schools of insubordinate, disorderly or irregular pupils, as well as habitual truants.

*Agricultural Service.* Chapter 689 permits the commissioner of education to suspend the Compulsory Education Law between April first and November first of each year, while the present war lasts and for two months thereafter, in order that the school children may cultivate the farms and gardens of the State. Credit upon school records must be given pupils engaged in such work. The university scholarships awarded by the State are to be extended on account of absence of their holders for military, industrial or agricultural service. School authorities may raise and expend funds for the welfare of the children engaged in this patriotic work.

*Juvenile Departments in State Employment Offices.* Chapter 749 amended sections 66-i and 66-j of the Labor Law by making the organization of separate juvenile placement departments obligatory instead of optional in State employment offices, limiting their establishment at the same time to first and second class cities; redefines their purposes, especially for the safeguarding of welfare and educational standards; and requires the selection of their supervisors and other employees from civil service lists. The new regulations differ from the old in relation to age limits and in the omission of express provisions for cooperation between school principals and employment office superintendents. The law appropriated fifteen thousand dollars to the bureau in view of these amendments.

#### Hours of Labor

*Women in Restaurants.* Chapter 535 amended section 161 of the Labor Law by prohibiting the employment in first and second-class cities of females over sixteen years of age in restaurants more than six days per week, nine hours per day or fifty-four hours per week, or before 6 A. M. or after 10 P. M. The law does not apply to female singers or performers, nor to attendants in ladies' cloak rooms and parlors. Further, it does not apply to hotel kitchens and dining rooms, nor to lunch rooms and restaurants conducted by employers for the exclusive use of their own employees.

Chapter 286, effective January 1, 1918, the text of which is not reproduced in this Bulletin, amended section 50 of the Insanity Law by abolition of the twelve-hour shift in the engineer's department of state hospitals. The salary list was also revised.

### Convict Labor

*Farm and Other Outside Work.* For the purpose of employing convicts at farm labor, stone quarrying and stone crushing, chapter 391 amended the Prison Law by authorizing the superintendent of state prisons, with the approval of the state comptroller, to lease farms and other real property within the state for not to exceed five years, to erect or alter buildings thereon and to transfer prisoners. The convicts are to remain within his custody and control. He may also transfer prisoners to other places for employment in useful occupations permitted by law.

### Miscellaneous

Two laws amended the Labor Law in regard to definitions and water closets; one has to do with theatrical employment agencies; two with vocational training; one with retirement pensions for certain state employees; and a seventh, chauffeurs' licenses. A resolution was also adopted by the Senate and Assembly providing for an investigation of the buildings in the city of Albany in which state employees are at work.

*Retirement Pensions for State Penal Institutions.* Chapter 712 added a new article to the Prison Law which authorized the superintendent of prisons and the managers of reformatories to retire state prison and reformatory employees of thirty years service record at one-half salary, not to exceed one thousand dollars per year. The pensions are protected against revocation, diminution and creditors' claims and the Governor may reinstate the retired employees.

*Labor Law: Definitions of Terms; Enforcement.* Chapter 694 amended section 2 of the Labor Law by revising the definitions of "factory," "factory building" and "mercantile establishment" and inserting additional definitions of "department," "commission" and "rule." The word "manufacturing" was made to include "altering, repairing, finishing, bottling, canning, cleaning or laundering;" mercantile establishments are to include accessory buildings or structures; factory and mercantile buildings having less than six employees are to be subject only to such structural provisions of the Labor Law as the Industrial Commission may by rule prescribe; the Labor Law is to apply to places in which less than one-tenth or less than twenty-five of all the persons at work are

engaged in manufacturing and to places used exclusively above the first story as dwellings only so far as the Industrial Commission may by rule prescribe; local officers are to have the enforcing powers and jurisdiction of the Industrial Commission so far as the law permits; and lack of consent to violation of provisions prohibiting employment is no defense for an employer, even if the employment involves no compensation.

*Trough Water Closets.* Chapter 693 amended subdivision 3 of section 88-a of the Labor Law so as to legalize trough water closets in factories provided such closets are of the types specified by the Industrial Commission.

*Theatrical Employment Agencies.* Chapter 770 amended the General Business Law by redefining theatrical employment agencies so as to exclude the business of managing entertainments, artists, etc., where such business only incidentally involves the seeking of employment therefor.

*Military and Vocational Training of Boys.* Chapter 49, amendatory of the Military Law, extended compulsory military training requirements to boys employed in occupations for livelihood, and permitted such requirements to be met in part by vocational training or experience which shall be preparatory to service in maintenance of the state's defense, promotion of the public safety, conservation and development of the state's resources or construction and maintenance of public improvements.

*Vocational Education.* Chapter 576 accepted Federal aid for vocational education, granted to the states by the Act of Congress dated February 23, 1917, made the state treasurer custodian of the moneys to be received and charged the education department with the state's administrative functions under the act.

*Suspension or Revocation of Chauffeurs' Licenses.* Chapter 769, amendatory of the Highway Law, required chauffeurs to give the secretary of state notice of change of residence within ten days thereof and empowered the secretary of state to suspend or revoke their licenses for specified offenses, failings or defects. Before suspension, a chauffeur is entitled to a hearing. Magistrates must transmit details of convictions for motor vehicle offenses to the secretary of state. The secretary of state must notify the local police chief or prosecuting officer whenever he suspends or revokes a license.

The text of the new sections conferring these powers upon the secretary of state is the only part of chapter 769 deemed necessary to be reproduced here.

*Investigation of Capitol Building.* In accordance with a concurrent resolution of the Senate and Assembly, adopted January 3, the State Industrial Commission conducted an investigation of the Capitol and other buildings in the city of Albany in which state employees are engaged for the purpose of ascertaining to what extent such buildings do not conform to the standards of the Labor Law applicable to factory buildings. The report of the investigation which appeared February 15, 1917, as Senate Document, Number 38, was condemnatory of the buildings, particularly from the standpoints of safety from fire, sanitation, lighting and ventilation.

#### RECOMMENDATIONS CONCERNING WORKMEN'S COMPENSATION IN ANNUAL MESSAGE OF GOVERNOR WHITMAN, 1917

At the last session of the Legislature numerous amendments were made to the workmen's compensation act. These amendments not only strengthened and improved the compulsory provisions of the law but they extended its benefits to many classes of employments not theretofore covered by it. In addition to this broadening of the scope of the compulsory provisions of the act the Legislature enacted, and it was my privilege to approve, an amendment to the law providing that the employers and workmen engaged in a business or industry not covered by the compulsory provisions of the law might elect to make themselves subject to these provisions.

The workmen's compensation act was further amended so as to include all employments enumerated in section 2 of the act carried on by the State or political subdivisions thereof, notwithstanding the definition of the term *employment* in subdivision 5 of section 3 of the law. The effect of this amendment was to make it compulsory upon the State and all political subdivisions thereof to secure compensation to employees injured in their service. However, no appropriation was made by the Legislature providing funds for the payment of compensation to employees of the State who might be injured or to dependents of workmen who might be killed in the course of their employment and thus be entitled to the protection afforded by the act. As a matter of fact, many accidents have occurred to employees of the State, claims for compensation have been presented to the Industrial Commission, and awards of compensation have been made in these cases. But the awards could not be paid for the reason that no funds were available. It therefore, becomes imperative that the Legislature shall appropriate immediately a sufficient amount to pay claimants in cases in which awards have already been made and to provide funds and machinery for the payment of claims which are certain to arise in the future.

At my request the State Industrial Commission is preparing a statement which will give approximately the cost of insuring compensation both to those



employees of the State covered by the compulsory provisions of the law and to all the employees of the State, should the Legislature elect to bring the so-called non-hazardous occupations within the provisions of the act. My judgment is that the State should in this respect, as in all others, be a model employer of labor and that it should elect to pay compensation to injured employees and to the dependents of employees who have been killed, even though the employments in which they are engaged do not come under the classifications of hazardous occupations enumerated in the act. If this is done, the Legislature should provide for securing compensation through the medium of the State Insurance Fund or should create a separate fund out of which the State may pay directly to the beneficiaries of the law any compensation to which such beneficiaries may be legally entitled.

Your attention is called to the fact that unless the State shall elect to bring under the provisions of the compensation act all of its employees without regard to the character of their occupations, those engaged in many branches of State employment which are extremely hazardous, not being enumerated in the groups covered by the compulsory provisions of the act, will not be protected by the law; as, for example, guards and keepers in our penal and reformatory institutions, guards and nurses in our asylums and hospitals for the insane, men engaged in forest preservation work and in the prevention and fighting of forest fires.

### TEXT OF LABOR LAWS OF 1917

[Arranged in chronological order of enactment as indicated by chapter numbers. In the case of acts which make changes in existing law, new matter introduced is printed in italic type and old matter omitted is enclosed in brackets. Acts containing new matter only are in Roman type throughout.]

#### Chapter 49.

#### **An Act to amend the military law, relative to military and disciplinary training.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Section twenty-seven of chapter forty-one of the laws of nineteen hundred and nine, entitled "An act in relation to the militia, constituting chapter thirty-six of the consolidated laws," as added by chapter five hundred and sixty-six of the laws of nineteen hundred and sixteen, is hereby amended to read as follows:

§ 27. Physical and disciplinary training in schools; military training. (1) The military training commission shall advise and confer with the board of regents of the university of the state of New York as to the courses of instruction in physical training to be prescribed for elementary and secondary schools as provided in the education law.

In order to more thoroughly and comprehensively prepare the boys of the elementary and secondary schools for the duties and obligations of citizenship, it shall also be the duty of the military training commission to recommend from time to time to the board of regents the establishment in such schools, of habits, customs and methods best adapted to develop correct physical posture and bearing, mental and physical alertness, self-control, disciplined initiative, sense of duty and the spirit of co-operation under leadership.

(2) After the first day of September, nineteen hundred and sixteen, all boys above the age of sixteen years and not over the age of nineteen years, except boys exempted by the commission, shall be given such military training as the commission may prescribe for periods aggregating not more than three hours in each week [during the school or college year, in the case of boys who are pupils in public or private schools or colleges, and for periods not exceeding those above stated] between September first of each year and the fifteenth day of June next ensuing [in the case of boys who are not pupils; but any boy who is regularly and lawfully employed in any occupation for a livelihood shall not be required to take such training unless he volunteers and is accepted therefor]. Such training periods, in the case of pupils in [such] schools and colleges, shall be in addition to prescribed periods of other instruction therein and outside the time assigned therefor. Such training shall be conducted under the supervision of the military training commission by such male teachers and physical instructors of schools and colleges as may be assigned by the boards of education or trustees of such schools or governing bodies of such colleges and accepted by the commission, and by officers and enlisted men of the national guard and naval militia detailed for that purpose by the major general commanding the national guard or such officer and enlisted men of the United States army as may be available. The officers and enlisted men of the national guard and naval militia so detailed shall, while in the actual performance of the duties of the detail, receive such percentage of the pay authorized by this chapter for officers and enlisted men of the national guard and naval militia of their respective grades and length of service as may from time to time be fixed by the commission. Teachers and instructors assigned from schools and colleges shall be paid such compensation as the commission may determine out of moneys appropriated for carrying out the provisions of this article.

*Such requirement as to military training, herein prescribed, may in the discretion of the commission be met in part by such vocational training or vocational experience as will, in the opinion of the commission, specifically prepare boys of the ages named for service useful to the state, in the maintenance of defense, in the promotion of public safety, in the conservation and development of the state's resources or in the construction and maintenance of public improvements.*

§ 2. This act shall take effect immediately.

Approved March 15.

#### Chapter 370.

An Act to amend the railroad law, in relation to equipment of engines.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Section seventy-seven of chapter four hundred and eighty-one of the laws of nineteen hundred and ten, entitled "An act in relation to railroads, constituting chapter forty-nine of the consolidated laws," is hereby amended to read as follows:

§ 77. Equipment of engines. It shall be unlawful for any railroad company to use within the state on its line or lines any locomotive engine not equipped

with a power driving wheel brake and appliances for operating the train brake system, or to use any locomotive engine operated by steam not equipped with a mechanically operated door to the fire box of such locomotive engine. Such mechanically operated door shall be so constructed and operated by steam, compressed air, electricity or other means as deemed best and most efficient by the officers of such railroad. The device for operating such door shall be so constructed that it may be operated by the fireman on said engine by means of a push button or other appliance located in the floor of the deck or floor of the tender at a suitable distance from such door to enable the fireman while firing such engine, by pressure with his foot to open such door for the firing of such engine; provided, however, that such mechanically operated doors shall not be required on locomotives equipped with mechanical stokers; and provided further that nothing in this section shall be construed to inhibit the passage of a locomotive engine not so equipped with such mechanically operated door, moving under its own steam either with or without a train, when such movement is from a point without this state through and to a point beyond its borders, or from a point without this state to a point within it, or from a point within this state to a point without it if such passage is for the purpose of moving it to or from a repair shop or shops for the purpose of repairing such locomotive engine, and when it is not intended for service within this state.

§ 2. All new locomotive engines placed in service, after this act shall take effect, shall be equipped with such mechanically operated doors. As to all locomotive engines not actually in service, nor assigned to or held for such service, within this state, at the time of the passage of this act, it shall take effect on and after the first day of January, nineteen hundred and nineteen. As to any locomotive engine or engines in actual service, or assigned to and held for such service, within this state, when this act shall take effect, the same may be continued in service until it is necessary to withdraw it or them for repairs; and every locomotive engine so withdrawn from service for repairs shall be properly equipped with such mechanically operated fire box doors before it shall be returned to service.

§ 3. This act shall take effect January first, nineteen hundred and nineteen.

Approved May 5.

#### Chapter 391.

An Act to amend the prison law, in relation to the leasing of sites for farm and other labor, transfers of prisoners and employment of prisoners at farm and other outside labor.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Chapter forty-seven of the laws of nineteen hundred and nine, entitled "An act relating to prisons, constituting chapter forty-three of the consolidated laws," is hereby amended by inserting therein at the end of article four a new section, to be section seventy-five, to read as follows:

§ 75. Lease and acquisition of lands for farm and other outside labor. The superintendent of state prisons, with the approval of the state comptroller, may lease for not to exceed five years, real property within the state for the

employment at farm labor, stone quarrying and stone crushing, of convicts confined in the state prisons. The superintendent of state prisons, subject to the audit now provided by law, may erect temporary structures or repair and alter necessary buildings on the lands so leased and provide necessary equipment for the purposes of this section. The expenses of such lease or leases, structures and equipment shall be chargeable to the manufacturing fund of the state prisons, known as the capital fund, and the revenues from such undertakings shall be paid into that fund as now or hereafter provided by law. The lease of any farm or site which may have been heretofore entered into for any of the above named purposes by the agent and warden of any state prison is hereby validated, and the premises so leased shall be available for the purposes of this section. Farm or other industries established and conducted under the provisions of this section shall be subject to the provisions of law applicable to other prison industries and farm labor in prisons.

§ 2. Such chapter is hereby amended by inserting therein after section one hundred and eighty a new section, to be section one hundred and eighty-a, to read as follows:

§ 180-a. Transfer of prisoners to prison farms and other places. The superintendent of state prisons may transfer such prisoners as he may select, confined in the state prisons, to farms or other premises leased under the provisions of section seventy-five of this chapter. The agent and warden, or such officer as may be designated by the superintendent of state prisons to be in charge of such farms or premises, may make such rules as he may deem necessary for the proper care, custody and control of such prisoners while employed as provided in such section, subject to the approval of the superintendent of state prisons. The convicts so transferred shall continue to be subject to prison discipline and within the custody and control of the superintendent of state prisons. The superintendent of state prisons may also transfer and provide in like manner for the custody and control of such convicts as he may select, confined in the state prisons, to other places in the state to be employed in such useful occupations as may be established by law for the employment of such prisoners.

§ 3. This act shall take effect immediately.

Approved May 7.

#### Chapter 532.

**An Act to amend the labor law, in relation to guarding of elevators and hoistways.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision two of section seventy-nine of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as amended by chapter two hundred and ninety-nine of the laws of nineteen hundred and nine, and amended by chapter two hundred and two of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

2. Guarding of elevators and hoistways. All counter-weights of every elevator shall be adequately protected by proper inclosures at the top and bottom

of the run, *except where, in the judgment of the commission, such inclosures are unnecessary.* The car of [all] every elevator[s] used for carrying passengers or employees shall be substantially enclosed on all sides, including the top, and [such car] shall [at all times] be properly lighted *during working hours or when in use*[, artificial illuminants to be provided and used when necessary]. The top of every freight elevator car or platform shall be provided with a substantial grating or covering for the protection of the operator thereof, in accordance with such rules and regulations as may be adopted with reference thereto by the industrial [board] *commission.*

§ 2. This act shall take effect immediately.

Approved May 17.

#### Chapter 535.

**An Act to amend the labor law, in relation to the hours of labor of women in restaurants.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Section one hundred and sixty-one of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as amended by chapter three hundred and eighty-seven of the laws of nineteen hundred and ten, chapter eight hundred and sixty-six of the laws of nineteen hundred and eleven, chapter four hundred and ninety-three of the laws of nineteen hundred and thirteen, chapter three hundred and thirty-one of the laws of nineteen hundred and fourteen and chapter three hundred and eighty-six of the laws of nineteen hundred and fifteen, is hereby amended by adding thereto, after subdivision two thereof, a new subdivision, to be subdivision three, and to read as follows:

3. In cities of the first and second class no female over the age of sixteen years shall be employed, permitted or suffered to work in or in connection with any restaurant more than six days or fifty-four hours in any one week, or more than nine hours in any one day, or before six o'clock in the morning or after ten o'clock in the evening of any day. This subdivision shall, however, not apply to females employed in restaurants as singers and performers of any kind, or as attendants in ladies' cloak rooms and parlors, nor shall it apply to females employed in or in connection with the dining rooms and kitchens of hotels, or in or in connection with lunch rooms or restaurants conducted by employers solely for the benefit of their own employees.

§ 2. Present subdivision three of said section is hereby renumbered subdivision four.

§ 3. This act shall take effect October first, nineteen hundred and seventeen.

Approved May 31.

#### Chapter 536.

**An Act to amend the labor law, in relation to the making of certain reports to school and other authorities.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Section seventy-five of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter

thirty-one of the consolidated laws," as amended by chapter three hundred and thirty-three of the laws of nineteen hundred and twelve and by chapter one hundred and forty-four of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

§ 75. Supervision over issuance of certificates. The board or department of health or health commissioner of a city, village or town, shall transmit, between the first and tenth day of each month, to the commissioner of labor, a list of the names of all children to whom certificates have been issued during the preceding month together with a duplicate of the record of every examination as to the physical fitness, including examinations resulting in rejection. *Such list shall be accompanied by a statement in a form which shall be prepared and furnished by the commissioner of labor, certifying to the kinds of evidence of age, together with the number of each specified kind, accepted by the officer issuing employment certificates as proof of age for the granting of employment certificates. The board or department of health or health commissioner of a city, village or town shall likewise transmit weekly to the superintendent of schools of each such locality, a list of the names and home addresses of all children granted or refused employment certificates, together with a statement showing in each rejected case the reason for such refusal.*

In cities of the first and second class all employment certificates and school records required under the provisions of this chapter shall be in such form as shall be approved by the commissioner of labor. In towns, villages or cities other than cities of the first or second class, the commissioner of labor shall prepare and furnish blank forms for such employment certificates and school records. No school record or employment certificate required by this article, other than those approved or furnished by the commissioner of labor as above provided, shall be used. The commissioner of labor shall inquire into the administration and enforcement of the provisions of this article by all public officers charged with the duty of issuing employment certificates, and for that purpose the commissioner of labor shall have access to all papers and records required to be kept by all such officers. *The commissioner of labor shall transmit to the local superintendent of schools between the first and tenth day of each month, on forms prepared and furnished by the state education department, a list of the names and home addresses of all children under sixteen years of age found during the preceding month, working illegally in factories or for any factory at any place or in any establishments specified in section one hundred and sixty-one of this chapter.*

§ 2. Section one hundred and sixty-six of said chapter as amended by chapter one hundred and forty-four of the laws of nineteen hundred and thirteen is hereby amended to read as follows:

§ 166. Supervision over issuance of certificates. The board or department of health or health commissioner of a city, village or town, shall transmit, between the first and tenth day of each month, to the commissioner of labor, a list of the names of all children to whom certificates have been issued during the preceding month, together with a duplicate of the record of [all examinations] every examination as to the physical fitness, including [those] examinations resulting in rejection. *Such list shall be accompanied by a statement in a form which shall be prepared and furnished by the commissioner of labor, certifying to the kinds of evidence of age, together with the*

*number of each specified kind, accepted by the officer issuing employment certificates as proof of age for the granting of employment certificates. The board or department of health or health commissioner of a city, village or town shall likewise transmit weekly to the superintendent of schools of each such locality, a list of the names and home addresses of all children granted or refused employment certificates, together with a statement showing in each rejected case the reason for such refusal.*

In cities of the first and second class all employment certificates and school records required under the provisions of this chapter shall be in such form as shall be approved by the commissioner of labor. In towns, villages or cities other than cities of the first or second class, the commissioner of labor shall prepare and furnish blank forms for such employment certificates and school records. No school record or employment certificate required by this article, other than those approved or furnished by the commissioner of labor as above provided, shall be used. The commissioner of labor shall inquire into the administration and enforcement of the provisions of this article by all public officers charged with the duty of issuing employment certificates, and for that purpose the commissioner of labor shall have access to all papers and records required to be kept by all such officers. *The commissioner of labor shall transmit to the local superintendent of schools between the first and tenth day of each month, on forms prepared and furnished by the state education department, a list of the names and home addresses of all children under sixteen years of age found during the preceding month, working illegally in factories or for any factory at any place or in any establishments specified in section one hundred and sixty-one of this chapter.*

§ 3. This act shall take effect immediately.

Approved May 17.

#### Chapter 563.

**An Act to amend the education law, in relation to compulsory education.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision one of section six hundred and twenty-one of chapter twenty-one of the laws of nineteen hundred and nine, entitled "An act relating to education, constituting chapter sixteen of the consolidated laws," as amended by chapter one hundred and forty of the laws of nineteen hundred and ten and chapter seven hundred and ten of the laws of nineteen hundred and eleven, is hereby amended to read as follows:

1. Every child within the compulsory school ages, in proper physical and mental condition to attend school, residing in a city or school district having a population of five thousand or more and employing a superintendent of schools, shall regularly attend upon instruction as follows:

(a.) Each child between seven and fourteen years of age shall attend the entire time during which the school attended is in session, which period shall not be less than [one hundred and sixty] *one hundred and eighty* days of actual school.

(b.) Each child between fourteen and sixteen years of age not regularly and lawfully engaged in any useful employment or service, and to whom an

employment certificate has not been duly issued under the provisions of the labor law, shall so attend the entire time during which the school attended is in session.

§ 2. Section six hundred and twenty-three of such chapter, as amended by chapter one hundred and forty of the laws of nineteen hundred and ten, is hereby amended to read as follows:

§ 623. Instruction elsewhere than at a public school. If any such child shall so attend upon instruction elsewhere than at a public school, such instruction shall be at least substantially equivalent to the instruction given children of like age at the public school of the city or district in which such child resides; and such attendance shall be for at least as many hours each day thereof as are required of children of like age at public schools; and no greater total amount of holidays or vacations shall be deducted from such attendance during the period such attendance is required than is allowed in such public school to children of like age. Occasional absences from such attendance, not amounting to irregular attendance in the fair meaning of the term, shall be allowed upon such excuses only as would be allowed in like cases by the general rules and practices of such public school.

*If a child required to attend upon instruction as provided in this article does not attend at a public, private or parochial school maintained in the city or district in which the parent or guardian of said child resides, such parent or guardian shall upon request furnish satisfactory proof to the local school authorities of said city or district that said child or ward is attending upon lawful instruction elsewhere.*

§ 3. Subdivision one of section six hundred and thirty of such chapter, as amended by chapter one hundred and forty of the laws of nineteen hundred and ten and chapter one hundred and one of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

1. A school record certificate shall contain a statement certifying that a child has regularly attended the public schools, or schools equivalent thereto, or parochial schools; for not less than one hundred and thirty days during the twelve months next preceding his fourteenth birthday or during the twelve months next preceding his application for such school record, and [that he is able to read and write simple sentences in the English language and has received during such period instruction in reading, writing, spelling, English grammar and geography and is familiar with the fundamental operations of arithmetic up to and including fractions, and has completed the work prescribed for the first six years of the public elementary school, or school equivalent thereto, or parochial school, from which such school record is issued.] *has completed the work in reading, writing, spelling, arithmetic, English language and geography, in English, prescribed for the first six years of the public elementary school or parochial school or school of equal rank maintaining an equivalent course of study in which the branches specified in subdivision one of section six hundred and twenty of this chapter are taught in English.* Such record shall also give the date of birth and residence of the child, as shown on the school records, and the name of the child's parents, guardian or custodian. *Such school record certificate shall be in the form prescribed or approved by the commissioner of education.*



No school record certificate shall be issued to any child under fifteen years of age for the purpose of obtaining an employment certificate, unless such child at the age of fourteen is a graduate of a public elementary school or parochial school or a school of equal rank maintaining an equivalent course of study in which the branches specified in subdivision one of section six hundred and twenty of this chapter are taught in English; or holds a pre-academic certificate issued by the regents, or a certificate of the completion of an elementary course issued by the state education department.

§ 4. Subdivision two of section six hundred and thirty-five of such chapter, as amended by chapter one hundred and forty of the laws of nineteen hundred and ten, is hereby amended to read as follows:

2. School authorities may provide for the confinement, maintenance and instruction of any child who is an habitual truant from instruction upon which he is lawfully required to attend, or is insubordinate or disorderly during attendance upon such instruction, or is irregular in such attendance [such truants] in such schools; and they or the superintendent of schools in any city or school district, may, after reasonable notice to such child and the persons in parental relation to such child, and an opportunity for them to be heard, and with the consent in writing of the persons in parental relation to such child, order such child to attend such school, or to be confined and maintained therein, under such rules and regulations as such authorities may prescribe, for a period not exceeding two years; but in no case shall a child be so confined after he is sixteen years of age.

§ 5. Section six hundred and thirty-five of such chapter as amended by chapter one hundred and forty of the laws of nineteen hundred and ten, is hereby amended by inserting therein a new subdivision, to be subdivision four-a, to read as follows:

4-a. An habitual truant and a child who, being subject to the provisions of this article, has been lawfully suspended or expelled from school, and is not receiving equivalent instruction elsewhere, as provided by section six hundred and twenty-three of this chapter, are hereby declared to be ungovernable children. Any such child may be apprehended by a truant officer of the school district or city where the child resides, or by any peace officer, and brought before a police magistrate having jurisdiction. Notice shall thereupon be given to the child's parent, guardian, or other person standing in parental relation to the child, and upon the submission of satisfactory proof that the child is an habitual truant or that, being subject to this article, he has been lawfully suspended or expelled from school and is not receiving instruction elsewhere, the magistrate may commit such child to a truant school maintained by such district or city, or, if no such truant school is maintained, to a private school, orphans' home or other similar institution if there be one, controlled by persons of the same religious faith as the persons in parental relation to such child, which is willing and able to receive, confine and maintain such child for a reasonable compensation.

§ 6. This act shall take effect immediately.

Approved May 29.

## Chapter 576.

**An Act to provide for the acceptance of the benefits of an act passed by the senate and house of representatives of the United States of America, in congress assembled, to provide for the promotion of vocational education.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. The state of New York hereby accepts all of the provisions and the benefits of an act passed by the senate and house of representatives of the United States of America, in congress assembled, entitled "An act to provide for the promotion of vocational education; to provide for co-operation with the states in the promotion of such education in agriculture and the trades and industries; to provide for co-operation with the states in the preparation of teachers of vocational subjects; and to appropriate money and regulate its expenditure," approved February twenty-third, nineteen hundred and seventeen.

§ 2. The state treasurer is hereby constituted and appointed the custodian of the moneys paid to the state of New York for vocational education, under the provisions of such act, and such moneys shall be paid out in the manner provided by such act for the purposes therein specified.

§ 3. The regents of the university of the state of New York are hereby designated as the state board for the purpose of carrying into effect the provisions of such act, and are hereby authorized and directed to co-operate with the federal board of vocational education in the administration and enforcement of its provisions, and to perform such official acts and exercise such powers as may be necessary to entitle the state to receive its benefits.

§ 4. This act shall take effect immediately.

Approved May 21.

## Chapter 629.

**An Act to amend the labor law, in relation to the storage of explosives and the penalty for violation of the provisions of the labor law in relation thereto.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Section two hundred and thirty-five of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as added by chapter two hundred and thirty-four of the laws of nineteen hundred and fifteen, is hereby amended to read as follows:

§ 235. Reports. All persons engaged in keeping or storing explosives, who shall not have heretofore made a report to the state fire marshal as required by section three hundred and sixty-three of the insurance law, now repealed, and all persons engaging in keeping or storing explosives after the provisions of this section take effect shall, before engaging in the keeping or storing of explosives, make a report to the [commissioner of labor] *industrial commission*, on blanks to be furnished by [him] *the commission* stating:

1. The location of the magazine, if then existing, or in case of a new magazine, the proposed location of such magazine.

2. The kind of explosives that are kept or stored or intended to be kept or stored and the maximum quantity that is intended to be kept or stored thereat.

3. The distance that such magazine is located or intended to be located from the nearest buildings and highways.

The [commissioner of labor] *industrial commission* shall, as soon as may be after receiving such report, cause an inspection to be made of the magazine, if then constructed, and in the case of a new magazine, as soon as may be after same is constructed. If upon such inspection the magazine is found to be constructed in accordance with the specifications provided in section two hundred and thirty-three of this article the [commissioner of labor] *industrial commission* shall determine the amount of explosives that may be kept or stored in such magazine by reference to the quantity and distance table set forth in section two hundred and thirty-one of this article, and [shall] *may* issue a certificate to the person applying therefor, showing compliance with the provisions of this article, which certificate shall set forth the maximum quantity of explosives that may be had, kept or stored in said magazine. Such certificate of compliance shall be valid until cancelled for cause as hereinafter provided. Whenever by reason of change in the physical conditions surrounding said magazine at the time of the issuance of the certificate of compliance therefor, such as the erection of buildings nearer said magazine or the operation of railways, or the opening of highways, *the owner of such magazine shall immediately notify the industrial commission and* the [commissioner of labor] *commission* shall modify or cancel such certificate in accordance with the changed conditions. Whenever any person to whom a certificate of compliance has been issued by the state fire marshal, [or] commissioner of labor, *or industrial commission* keeps or stores in the magazine covered by such certificate of compliance any quantity of explosives in excess of the maximum amount set forth in such certificate of compliance issued therefor, or whenever any person fails for thirty days to pay the annual license fee hereinafter provided after the same becomes due, the [commissioner of labor] *industrial commission* is authorized to cancel such certificate of compliance and to order the removal of all explosives stored in said magazine.

Every person engaging in the keeping or storing of explosives shall pay an annual license fee for each magazine maintained, to be graduated by the [commissioner of labor] *industrial commission* according to the quantity kept or stored therein, of not less than five dollars nor more than twenty-five dollars. Said license fee shall be payable in advance to the [commissioner of labor] *industrial commission* and by [him] *the commission* paid to the state treasurer.

§ 2. Such chapter is hereby amended by adding after section two hundred and thirty-five a new section, to be section two hundred and thirty-five-a thereof, to read as follows:

§ 235-a. *In time of war the governor may from time to time prepare, make, modify, amend and promulgate by public proclamation such rules and regulations in the interest of public safety as he may deem necessary governing the manufacture, distribution, storage and use or possession for necessary and proper purposes in time of war, all such smokeless powder, explosives, blasting,*

*supplies and the ingredients thereof, combustibles, starters and supporters, asphyxiating gases and corrosives. Such rules and regulations so promulgated by the governor shall take effect thirty days after the proclamation thereof.*

§ 3. Sections two hundred and thirty-seven and two hundred and thirty-eight of such chapter, as added by chapter two hundred and thirty-four of the laws of nineteen hundred and fifteen, are hereby amended to read as follows:

§ 237. Records of sale. Every person selling or giving away explosives within this state shall keep at all times an accurate journal or book of record in which must be entered from time to time, as it is made, each and every sale made by such person in the course of business, or otherwise, of any quantity of explosives. Such journal or record book must show in legible writing, to be entered therein at the time, a complete history of each transaction stating the name and quantity of explosives sold, name, place of residence and business of the purchaser, name of individual to whom delivered, with his or her address. Such journal or book of record must be kept by the person so selling explosives in his or their principal office or place of business, at all times subject to the inspection and examination of the [commissioner of labor] *industrial commission*, [his] its deputies, and the police authorities of the county or municipality where the same is situated, on proper demand therefor. Nothing in this section, however, shall apply to persons selling or giving away explosives in quantities of five pounds or less at any one time.

§ 238. Exceptions. Nothing contained in this article in sections two hundred and thirty to two hundred and thirty-seven, inclusive, shall be deemed to include gasoline, kerosene, naphtha, turpentine or benzine, nor shall any of the provisions of this article fifteen-a apply to cities of this state having more than one million inhabitants. In any other city of the state having a department of public safety and connected therewith a bureau of explosives or combustibles, the provisions of this article shall be enforced by such local authorities.

§ 4. This act shall take effect immediately.

Approved May 23.

#### Chapter 634.

**An Act to amend the labor law, in relation to fire alarm signal systems.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision one of section eighty-three-a of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as added by chapter three hundred and thirty of the laws of nineteen hundred and twelve and amended by chapter two hundred and three of the laws of nineteen hundred and thirteen, chapter three hundred and forty-seven of the laws of nineteen hundred and fifteen and chapter four hundred and sixty-six of the laws of nineteen hundred and sixteen, is hereby amended to read as follows:

§ 83-a. Fire alarm signal systems and fire drills. 1. Every factory building over two stories in height in which more than twenty-five persons are employed, above the ground floor shall be equipped with a fire alarm signal system with a sufficient number of signals clearly audible to all occupants

thereof, except in buildings in which every square foot of the floor area on all stories is protected with an automatic sprinkler system having two adequate sources of water supply and approved by the public authorities having jurisdiction and in which also the maximum number of occupants on any one floor does not exceed by more than fifty per centum the capacity of the exits as determined by subdivisions one, two, three, four, five, six and seven of section seventy-nine-e of this chapter. [The industrial board] *The board of standards and appeals in the city of New York, and elsewhere the industrial commission, may make rules and regulations prescribing the number, character and location of such signals[.], and the mode, manner, method and character of installation, including the character of all appliances in connection therewith.* Such system shall be installed by the owner or lessee of the building and shall permit the sounding of all the alarms within the building whenever the alarm is sounded in any portion thereof. Such system shall be maintained in good working order. No person shall tamper with, or render ineffective any portion of said system except to repair the same. It shall be the duty of whoever discovers a fire to cause an alarm to be sounded immediately.

§ 2. This act shall take effect immediately.

Approved May 23.

#### Chapter 689.

**An Act relating to the employment of children in agricultural pursuits and relieving children so employed from school attendance, and providing for credit to pupils who are engaged in military, agricultural and industrial services.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. The provisions of article twenty-three of the education law, relative to the compulsory education of children, may, in the discretion of the commissioner of education, be suspended for the period between the first day of April and the first day of November of each year, or any portion thereof, during the time that this act shall remain in effect, for the purpose of aiding and performing labor in the cultivation, production and care of food products upon farms and gardens within the state. Such suspension shall be subject to such conditions, restrictions and limitations as may be imposed by the commissioner of education, and shall be subject to rules and regulations to be prescribed by him. In case of any such suspension provision shall be made for the welfare and protection of the children affected thereby, and during the period of such suspension and while engaged in such work they shall be under the supervision and direction of the school authorities of the city or district in which they reside.

§ 2. The board of education of a union free school district or the trustee of a common school district may appropriate and expend district funds for the purpose of carrying out the provisions of this act and of the rules and regulations of the commissioner of education, without the vote of a district meeting, and such amount may be raised by tax in the same manner as for other school expenditures. The board of education or other proper authorities of a city shall provide for the raising of money for the purpose of providing

for the supervision, protection and welfare of the children of the city during the time that they are engaged in the work authorized by this act, and the amounts expended therefor shall be a charge against the city and shall be paid in the same manner as other charges against the city are paid.

§ 3. The expenditures of the commissioner of education in carrying into effect the provisions of this act shall be paid out of the sums appropriated by the state for national or state defense, upon the certificate of the governor that in his opinion there is necessity for using a portion of the sums so appropriated for such purpose. The commissioner of education may apportion to the cities and school districts of the state, out of funds available therefor, a sum not exceeding twenty-five per centum of the amount expended by any of such cities or districts in providing for the supervision, protection and welfare of children, who are engaged in the work authorized by this act. The board of education or trustees of a city or district may accept a gift, transfer, devise or bequest of property or money, to be used or applied for the purpose of carrying into effect the provisions of this act and of the rules and regulations of the commissioner of education in such city or district, and for the purpose of providing for the proper supervision, protection and welfare of the children of such city or district who may be engaged in such work.

§ 4. A pupil in the public schools or in any state school or institution who is relieved from school work and is engaged satisfactorily in agricultural service during the present school year shall be given credit for the work of the present term without examination, on the certificate of the person in charge of such school or institution that his work therein up to the time of engaging in such service is satisfactory. A pupil in any such school or institution who engages in such service during the present school year shall not incur any loss of standing or credit on account of such service. All pupils in public schools who are candidates for college entrance diplomas or other credentials to be issued to them at the close of the present school year shall be granted such diplomas or credentials on the certificate of the principal of the school that their work up to the time of engaging in such service is satisfactory. The regents of the university shall make rules for the purpose of giving credit to pupils in the public schools who have been in attendance at school during the present school year and who have left the schools for the purpose of rendering agricultural or industrial service.

Where the holders of university scholarships awarded as provided in sections seventy to seventy-seven, inclusive, of the education law as amended, shall be absent from the colleges or universities where they are in attendance, because of the performance of military service or of agricultural or industrial service, they shall be entitled to an extension of the period covered by such scholarships, upon presentation of evidence satisfactory to the commissioner of education, that they have been engaged in such service; but in no case shall the holder of such a scholarship be entitled to receive more than the sum of one hundred dollars each year for a period of four years, to aid him in the completion of a college education.

§ 5. The commissioner of education shall cause appropriate certificates or badges to be prepared and issued to pupils in the schools of the state who shall perform satisfactory agricultural or industrial service under rules and regulations of the commissioner of education.

§ 6. This act shall take effect immediately and shall continue in full force and effect until the end of the present war and for a period of two months thereafter.

Approved May 29.

#### Chapter 693.

**An Act to amend the labor law, in relation to trough water closets.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision three of section eighty-eight-a of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as added by chapter three hundred and forty of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

3. The use of any form of trough water closet, latrine or school sink, *other than those types specified in the rules of the state industrial commission*, within any factory is prohibited. All such trough water closets, latrines or school sinks *which do not conform to the specifications set forth in the rules of the state industrial commission* shall, before the first of October, nineteen hundred and fourteen, be completely removed and the place where they were located properly disinfected under the direction of the department of labor. Such appliances shall be replaced by proper individual water closets, *or by trough water closets conforming to the rules of the state industrial commission*, placed in water closet compartments, all of which shall be constructed and installed in accordance with the rules and regulations to be adopted by the state industrial [board] commission.

§ 2. This act shall take effect immediately.

Approved May 31.

#### Chapter 694.

**An Act to amend the labor law, in relation to definitions.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Section two of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as amended by chapter five hundred and twenty-nine of the laws of nineteen hundred and thirteen, as amended by chapter five hundred and twelve of the laws of nineteen hundred and fourteen, and amended by chapter six hundred and fifty of the laws of nineteen hundred and fifteen, is hereby amended to read as follows:

§ 2. Definitions. 1. *Whenever used in this chapter:*

[Employee.] The term "employee"[, when used in this chapter,] means a mechanic, workingman or laborer who works for another for hire.

[Employer.] The term "employer"[, when used in this chapter,] means the person employing any such mechanic, workingman or laborer, whether the owner, proprietor, agent, superintendent, foreman or other subordinate.

[Factory; work for a factory.] The term "factory"[, when used in this chapter, shall be construed to] includes any mill, workshop, or other manufacturing [or business] establishment and all buildings, sheds, structures or

other places used for or in connection therewith, where one or more persons are employed at [labor,] *manufacturing, including making, altering, repairing, finishing, bottling, canning, cleaning or laundering any article or thing, in whole or in part*, except dry dock plants engaged in making repairs to ships, and except power houses, generating plants, barns, storage houses, sheds and other structures owned or operated by a public service corporation, other than construction or repair shops, subject to the jurisdiction of the public service commission under the public service commissions law. *The provisions of this chapter affecting structural changes and alterations, shall not apply to factories or to any buildings, sheds, structures or other places used for or in connection therewith where less than six persons are employed at manufacturing except as otherwise prescribed by the state industrial commission in its rules.* [Work shall be deemed to be done for a factory within the meaning of this chapter whenever it is done at any place, upon the work of a factory or upon any of the materials entering into the product of the factory, whether under contract or arrangement with any person in charge of or connected with such factory directly or indirectly through the instrumentality of one or more contractors or other third persons.]

[Factory building.] The term "factory building" [ , when used in this chapter,] means any building, shed or structure which, or any part of which, is occupied by or used for a factory, and in which at least one-tenth or more than twenty-five of all the persons employed in the building are engaged in work for a factory but shall not include a building used exclusively for dwelling purposes above the first story. *The provisions of this chapter shall, so far as prescribed by the state industrial commission in its rules, also apply to any building, not a factory building within the meaning hereof, any part of which is occupied by or used for a factory.*

[Mercantile establishment.] The term "mercantile establishment" [ , when used in this chapter,] means any place where goods, wares or merchandise are offered for sale and shall include any building, shed or structure, or any part thereof, which is occupied in connection with such establishment. *The provisions of this chapter affecting structural changes and alterations, shall not apply to mercantile establishments where less than six persons are employed except as otherwise prescribed by the state industrial commission in its rules.*

[Tenement house.] The term "tenement house" [ , when used in this chapter,] means any house or building, or portion thereof, which is either rented, leased, let or hired out, to be occupied, or is occupied in whole or in part as the home or residence of three families or more living independently of each other and doing their cooking upon the premises, and includes apartment houses, flat houses and all other houses so occupied, and for the purposes of this chapter shall be construed to include any building on the same lot with any such tenement house and which is used for any of the purposes specified in section one hundred of this chapter.

*The term "department" means the department of labor of the state of New York.*

*The term "commission" means the industrial commission of the state of New York.*



*The term "rule" means any rule or regulation made by the industrial commission and any amendment or repeal thereof.*

Whenever, in this chapter, authority is conferred upon the [commissioner of labor] state industrial commission, it shall also be deemed to include [his] its deputies or a deputy acting under [his] its direction. Whenever the enforcement of any of the provisions of this chapter is committed to any local officer or officers, by any law now in force or hereafter enacted, such local officer or officers with respect to the matters thus committed to them shall be deemed to have the powers and jurisdiction of the industrial commission of the state of New York to the extent specified in the law committing the enforcement of such provisions to each local officer or officers.

2. *Prohibited employment.* Whenever the provisions of this chapter prohibit the employment of a person in certain work or under certain conditions, the employer shall not permit, suffer or allow such person to so work, either with or without compensation, and in a prosecution or action therefor lack of consent on the part of the employer shall be no defense.

3. *Work shall be deemed to be done for a factory within the meaning of this chapter whenever it is done at any place, upon the work of a factory or upon any of the materials entering into the product of the factory, whether under contract or arrangement with any person in charge of or connected with such factory directly or indirectly through the instrumentality of one or more contractors or other third persons.*

§ 2. This act shall take effect immediately.

Approved May 31.

#### Chapter 705.

#### An Act to amend the workmen's compensation law, generally.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Sections two and three of chapter eight hundred and sixteen of the laws of nineteen hundred and thirteen, entitled "An act in relation to assuring compensation for injuries or death of certain employees in the course of their employment, and repealing certain sections of the labor law relating thereto, constituting chapter sixty-seven of the consolidated laws," as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen and amended by chapter six hundred and twenty-two of the laws of nineteen hundred and sixteen, are hereby amended to read respectively, as follows:

§ 2. *Application.* Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments:

Group 1. The operation, including construction and repair, of railways, operated by steam, electric or other motive power, street railways, and incline railways, but not their construction when constructed by any person other than the company which owns or operates the railway, including work of express, sleeping, parlor and dining car employees on railway trains.

Group 2. Construction, repair and operation of railways not included in group one.

Group 3. The operation, including construction and repair, of car shops, machine shops, steam and power plants, and other works for the purposes of

any such railway, or used or to be used in connection with it when operated, constructed or repaired by the company which owns or operates the railway.

Group 4. The operation, including construction and repair, of car shops, machine shops, steam and power plants, not included in group three.

Group 5. The operation, including construction and repair, of telephone lines and wires for the purposes of the business of a telephone company, or used or to be used in connection with its business, when constructed or operated by the company.

Group 6. The operation, including construction and repair, of telegraph lines and wires for the purposes of the business of a telegraph company, or used or to be used in connection with its business, when constructed or operated by the company.

Group 7. Construction or repair of telegraph and telephone lines not included in groups five and six.

Group 8. The operation within or without the state, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company; marine wrecking.

Group 9. Shipbuilding, including construction and repair in a ship-yard or elsewhere, not included in group eight.

Group 10. Longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage.

Group 11. Dredging, subaqueous or caisson construction or repair, and pile driving.

Group 12. Construction, installation, repair or operation of electric light and electric power lines, dynamos, or appliances, and power transmission lines.

Group 13. Paving; road building, curb and sidewalk construction or repair; sewer and subway construction or repair, work under compressed air, excavation, tunnelling and shaft sinking, well digging, laying and repair of underground pipes, cables and wires; *grave digging; undertaking; landscape gardening; planting, moving, trimming and care of trees and tree surgery.* not included in other groups; street cleaning, ashes, garbage or snow removal; *garbage sorters*; operation of water works.

Group 14. Lumbering; logging, river-driving, rafting, booming, saw mills, bark mills; shingle mills, lath mills, lumber yards; manufacture of veneer and of excelsior; manufacture of barrels, kegs, vats, tubs, staves, spokes, or headings.

Group 15. Pulp and paper mills.

Group 16. Manufacture of furniture, interior woodwork, organs, pianos, piano actions, canoes, small boats, coffins, wicker and rattan ware; upholstering; manufacture of mattresses or bed springs.

Group 17. Planing mills, sash and door factories, manufacture of wooden and corrugated paper boxes, cheese boxes, mouldings, window and door screens, window shades, carpet sweepers, wooden toys, wooden articles and wares or baskets; cork cutting.

Group 18. Mining; reduction of ores and smelting; preparation of metals or minerals; oil and gas wells.

Group 19. Quarries; sand, shale, clay, or gravel pits; lime kilns; manufacture of brick, tile, terra-cotta, asbestos, fire-proofing, or paving blocks, manufacture of calcium carbide, cement, asphalt or paving material; stone crushing or grinding; coal yards.

Group 20. Manufacture of glass, glass products, glassware, porcelain or pottery.

Group 21. Iron, steel or metal foundries; rolling mills; manufacture of castings, forgings, heavy engines, locomotives, machinery, safes, anchors, cables, rails, shafting, wires, tubing, pipes, sheet metal, boilers, furnaces, stoves, structural steel, iron or metal; machine shops including repairs.

Group 22. Operation and repair of stationary engines and boilers, freight and passenger elevators, not included in other groups; window cleaning; erection, removal or repair of awnings; heating and lighting.

Group 23. Manufacture of small castings or forgings, metal wares, instruments, utensils and articles, hardware, nails, wire goods, screws, bolts, metal beds, sanitary, water, gas or electric fixtures, light machines, typewriters, cash registers, adding machines, carriage mountings, bicycles, metal toys, tools, cutlery, instruments, photographic cameras and supplies, sheet metal products, buttons; jewelry; gold, silver and plated ware; articles of bone, ivory and shell.

Group 24. Manufacture of agricultural implements, threshing machines, traction engines, wagons, carriages, sleighs, vehicles, automobiles, motor trucks, toy wagons, sleighs or baby carriages; blacksmiths; horse-shoers.

Group 25. Manufacture of [explosives and dangerous chemicals, corrosive acids or salts,] ammonia, [gasoline,] petroleum, petroleum products, celluloid, [gas] pyroxylin or the compounds of pyroxylin or pyroxylin plastics, gases, charcoal[,], or artificial ice, and the manufacture, storing or handling of explosives and dangerous chemicals, corrosive acids or salts, gasoline, petroleum, gun powder or ammunition; laboratories; ice harvesting, ice storage and ice distribution.

Group 26. Manufacture of paint, color, varnish, oil, japans, turpentine, printing and other ink, printers' rollers, tar, tarred, pitched or asphalt paper.

Group 27. Distilleries, breweries; manufacture of spirituous or malt liquors, alcohol, wine, mineral water or soda waters; bottling.

Group 28. Manufacture of drugs and chemicals, not specified in group twenty-five, medicines, dyes, extracts, pharmaceutical or toilet preparations, soaps, candles, perfumes, non-corrosive acids or chemical preparations, fertilizers, including garbage or sewerage disposal plants; disinfecting; shoe blacking or polish.

Group 29. Milling; manufacture of cereals or cattle foods; warehousing; storage of all kinds and storage for hire; operation of grain elevators.

Group 30. Packing houses, meat markets, wholesale groceries; fish markets; planting, cultivating and harvesting of oysters, clams or other sea foods; poultry markets; abattoirs, manufacture or preparation of meats or meat products or glue, gelatine, paste or wax.

Group 31. Tanneries.

Group 32. Furriers; manufacture of leather goods and products, belting,

saddlery, harness, trunks, valises, boots, shoes, gloves, umbrellas, rubber goods, rubber shoes, tubing, tires or hose.

Group 33. Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries; manufacture of dairy products.

Group 34. *Hotels having fifty or more rooms*; [B] *bakeries*, including manufacture of crackers and biscuits, manufacture of confectionery, spices or condiments.

Group 35. Manufacture of tobacco, cigars, cigarettes or tobacco products.

Group 36. Manufacture of cordage, ropes, fibre, brooms or brushes; manilla or hemp products.

Group 37. Flax mills; manufacture of textiles or fabrics, spinning, weaving and knitting manufactories; manufacture of yarn, thread, hosiery, cloth, blankets, carpets, canvas, bags, shoddy or felt.

Group 38. Manufacture of men's or women's clothing, white wear, shirts, collars, corsets, hats, caps, furs or robes, or other articles from textiles or fabrics.

Group 39. Power laundries; dyeing, cleaning or bleaching.

Group 40. Printing, engraving, photo-engraving, stereotyping, electrotyping, lithographing, embossing; manufacture of moving picture machines and films; manufacture of stationery, paper, cardboard boxes, bags or wall-paper; and book-binding.

Group 41. The operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules; *life saving stations and lifeguards*; public garages, livery, boarding or sales stables, movers of all kinds; *operation of hand trucks*; *transportation of goods on rollers*; *manufacture and operation of aeroplanes or other air craft*.

Group 42. Stone cutting or dressing; marble works; manufacture of artificial stone; steel building and bridge construction or repair; installation or repair of elevators, fire escapes, boilers, engines or heavy machinery; brick-laying, tile-laying, mason work, stone-setting, concrete work, plastering; and manufacture of concrete blocks; structural carpentry; painting, papering, picture hanging, glazing, decorating or renovating; sheet metal work; roofing; construction, repair and demolition of buildings, bridges and other structures; *blasting*; *maintenance and care of buildings*; salvage of buildings or contents; plumbing, sanitary lighting or heating installation or repair; installation and covering of pipes or boilers; junk dealers.

Group 43. Any employment enumerated in the foregoing groups and carried on by the state or a municipal corporation or other subdivision thereof, notwithstanding the definition of the term "employment" in subdivision five of section three of this chapter.

Group 44. *Employment as a keeper, guard, nurse or orderly in a prison, reformatory, insane asylum or hospital maintained or operated by the state or municipal corporation or other subdivision thereof, notwithstanding the definitions of the terms "employment," "employer" or "employee" in subdivision five of section three of this chapter.*

Any employer not carrying on one of the employments enumerated in this section, or who carrying on one of such employments has in his employ an

employee not included within the term "employee" as defined by section three of this chapter, and the employees of any such employer may, by their joint election, elect to become subject to the provisions of this chapter in the manner hereinafter provided. Such election on the part of the employer shall be made by posting notices thereof about the place where the workmen are employed, in a manner to be prescribed by rules to be adopted by the commission, and by filing with the commission a written statement, in a form to be prescribed by the commission, to the effect that he accepts the provisions of this chapter and that he adopts subject to the approval of the commission one of the methods of securing compensation to his employees prescribed in section fifty of this chapter which, when so filed with and approved by the commission as to form and method of securing compensation shall operate to subject him to the provisions of this chapter and of all acts amendatory thereof for the period of one year from the date of such approval, and thereafter without further act on his part for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file with the commission a notice in writing that he withdraws his election.

Any employee in the service of any such employer shall be deemed to have accepted, and shall be subject to the provisions of this chapter and any act amendatory thereof, if, at the time of the accident for which liability is claimed, the employer charged with such liability has not withdrawn his election and the employee shall not at the time of entering into his contract of hire have given to his employer notice in writing that he elects not to be subject to the provisions of this chapter and filed a copy thereof with the commission, or in the event that such contract for hire was made in advance of the election of the employer, such employee shall not have given to his employer and filed with the commission within twenty days after such election notice in writing that he elects not to be subject to such provisions.

A minor employee shall be deemed *sui juris* for the purpose of making such an election.

The rights and remedies, benefits and liabilities of an employer or employee so electing to become subject to the provisions of this chapter shall thereupon become the same as they would have been had they been engaged in one of the occupations or employments enumerated herein and the words employer or employee wherever they appear in this chapter shall be construed as including an employer or employee who has so elected to become subject to its provisions.

§ 3. Definitions. As used in this chapter, 1. "Hazardous employment" means a work or occupation described in section two of this chapter.

2. "Commission" means the state industrial commission, as constituted by this chapter.

3. "Employer," except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing workmen in hazardous employments including the state and a municipal corporation or other political subdivision thereof.

4. "Employee" means a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal

business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants.

5. "Employment" includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain, or in connection therewith, except where the employer and his employees have by their joint election elected to become subject to the provisions of this chapter as provided in section two.

6. "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein.

7. "Injury" and "personal injury" mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.

8. "Death" when mentioned as a basis for the right to compensation means only death resulting from such injury.

9. "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer.

10. "State fund" means the state insurance fund provided for in article five of this chapter.

11. "Child" shall include a posthumous child [and] a child legally adopted prior to the injury of the employee; and a step-child or acknowledged illegitimate child dependent upon the deceased.

12. "Insurance carrier" shall include the state fund, stock corporations or mutual associations with which employers have insured, and employers permitted to pay compensation directly under the provisions of subdivision three of section fifty.

13. "Manufacture," "construction," "operation" and "installation" shall include "repair," "demolition" and "alteration" and shall include all work done in connection with the repair of plants, buildings, grounds and approaches of all places where any of the hazardous employments are being carried on, operated or conducted.

§ 2. Section twelve of such chapter as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen is hereby amended to read as follows:

§ 12. Compensation not allowed for first two weeks. No compensation shall be allowed for the first fourteen days of disability, except the benefits provided for in section thirteen of this chapter, *provided, however, that in case the injury results in disability of more than forty-nine days the compensation shall be allowed from the date of the disability.*

§ 3. Section fifteen of such chapter, as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen, and amended by chapter six hundred and fifteen of the laws of nineteen hundred and fifteen, and chapter six hundred and twenty-two of the laws of nineteen hundred and sixteen, is hereby amended to read as follows:

§ 15. Schedule in case of disability. The following schedule of compensation is hereby established:

1. **Total permanent disability.** In case of total disability adjudged to be permanent sixty-six and two thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other case permanent total disability shall be determined in accordance with the facts.

2. **Temporary total disability.** In case of temporary total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance thereof, but not in excess of three thousand five hundred dollars, except as otherwise provided in this chapter.

3. **Permanent partial disability.** In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in the schedule, as follows:

**Thumb.** For the loss of a thumb, sixty weeks.

**First finger.** For the loss of a first finger, commonly called index finger, forty-six weeks.

**Second finger.** For the loss of a second finger, thirty weeks.

**Third finger.** For the loss of a third finger, twenty-five weeks.

**Fourth finger.** For the loss of a fourth finger, commonly called the little finger, fifteen weeks.

**Phalange of thumb or finger.** The loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the amount above specified. The loss of more than one phalange shall be considered as the loss of the entire thumb or finger[.]. *Where the injury results in the loss of more than one finger, compensation therefor may be awarded for the proportionate loss of the use of the hand thereby occasioned; provided, however, that in no case shall [the amount received] the compensation awarded for more than one finger exceed the amount provided in this schedule for the loss of a hand.*

**Great toe.** For the loss of a great toe, thirty-eight weeks.

**Other toes.** For the loss of one of the toes other than the great toe, sixteen weeks.

**Phalange of toe.** The loss of the first phalange of any toe shall be considered to be equal to the loss of one-half of said toe, and the compensation shall be one-half of the amount specified. The loss of more than one phalange shall be considered as the loss of the entire toe. *Where the injury results in the loss of more than one toe compensation therefor may be awarded for the proportionate loss of the use of the foot thereby occasioned, provided, however, that in no case shall the compensation awarded for more than one toe exceed the amount provided in this schedule for the loss of the foot.*

**Hand.** The loss of a hand, two hundred and forty-four weeks.

**Arm.** For the loss of an arm, three hundred and twelve weeks.

**Foot.** For the loss of a foot, two hundred and five weeks.

**Leg.** For the loss of a leg, two hundred and eighty-eight weeks.

**Eye.** For the loss of an eye, one hundred and twenty-eight weeks.

**Loss of use.** Permanent loss of the use of a hand; arm, foot, leg, eye, thumb, finger, toe or phalange, shall be considered as the equivalent of the loss of such hand, arm, foot, leg, eye, thumb, finger, toe or phalange.

*Partial loss and partial loss of use.* For the partial loss or the partial loss of the use of a hand, arm, foot, leg or eye, compensation therefor may be awarded for the proportionate loss or proportionate loss of the use of such hand, arm, foot, leg or eye.

**Amputations.** Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand. Amputation between the knee and the ankle shall be considered as the equivalent of the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm. Amputation at or above the knee shall be considered as the loss of the leg.

The compensation for the foregoing specific injuries shall be in lieu of all other compensation, except the benefits provided in section thirteen of this chapter.

In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars.

**Other cases.** In all other cases in this class of disability, the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the commission on its own motion or upon application of any party in interest.

4. **Temporary partial disability.** In case of temporary partial disability, except the particular cases mentioned in subdivision three of this section, an injured employee shall receive sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise during the continuance of such partial disability, but not to exceed when combined with his decreased earnings the amount of wages he was receiving prior to the injury, and not to exceed in total the sum of three thousand five hundred dollars, except as otherwise provided in this chapter.

5. **Limitation.** The compensation payment under subdivisions one, two and four and under subdivision three except in case of the loss of a hand, arm, foot, leg or eye, shall not exceed fifteen dollars per week nor be less than five dollars per week; the compensation payment under subdivision three in case of the loss of a hand, arm, foot, leg or eye, shall not exceed twenty dollars per week nor be less than five dollars a week; provided, however, that if the employee's wages at the time of injury are less than five dollars per week he shall receive his full weekly wages.

6. **Previous disability.** The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compen-



sation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability.

7. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of one hundred dollars. The state treasurer shall be the custodian of this special fund, and the commission shall direct the distribution thereof.

§ 4. Section twenty of such chapter as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen and amended by chapter one hundred and sixty-seven of the laws of nineteen hundred and fifteen is hereby amended to read as follows:

§ 20. Determination of claims for compensation. At any time after the expiration of the first fourteen days of disability on the part of an injured employee, or at any time after his death, a claim for compensation may be presented to the employer and if rejected or if within ten days after presentation, a report containing an agreement for compensation be not made and filed with the commission as provided by this section, the claim may be presented to the commission. The commission shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The commission shall make or cause to be made such investigation as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the commission[, together with a statement of its conclusion of fact and rulings of law]. The commission may before making an award, require the claimant to appear before an arbitration committee appointed by it and consisting of one representative of employees, one representative of employers, and either a member of the commission or a person specially deputed by the commission to act as chairman, before which the evidence in regard to the claim shall be adduced and by which it shall be considered and reported upon. Immediately after such filing the commission shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law. When a claim is presented to an employer, and the employer and employee, or in case of death, his principal dependent, enter into an agreement for the payment of compensation therefor pursuant to this chapter, a joint report of such

claim containing such agreement shall be made to the commission upon a form prepared by it and signed by the employer and employee, or in case of death his principal dependent. The commission shall examine such report and approve the same when the terms are strictly in accordance with this chapter and such approval shall constitute an award. However, the commission may make an award in the manner provided in this section in any case, and if the terms of the award vary from the joint report, the employer shall comply with the award. In case of unfair dealing or of bad faith on the part of the employer under this section, the commission may impose a penalty of not more than ten per centum of the award.

§ 5. Section twenty-three of such chapter as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen and as amended by chapter six hundred and twenty-two of the laws of nineteen hundred and sixteen is hereby amended to read as follows:

§ 23. Appeals from the commission. An award or decision of the commission shall be final and conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless [within thirty days after a copy of such award or decision has been sent to the parties, an appeal be taken to the appellate division of the supreme court of the third department] *reversed or modified on appeal therefrom as hereinafter provided.* Within thirty days after notice of the filing of the award or the decision of the commission has been sent to the parties an appeal may be taken to the appellate division of the supreme court, third department, from such award or decision by any party in interest including an employer insured in the state fund. If notice of such appeal is served upon the commission, the commission shall within thirty days thereafter serve upon the parties in interest a statement of its conclusions of fact and rulings of law in such case. The commission may also, in its discretion, [on the application of either party] certify to such appellate division of the supreme court, questions of law involved in its decision. Such appeals and the questions so certified shall be heard in a summary manner and shall have precedence over all other civil cases in such court. The commission shall be deemed a party to every such appeal, and the attorney-general, without extra compensation, shall represent the commission thereon. An appeal may also be taken to the court of appeals in all cases where the decision of the appellate division is not unanimous and by the consent of the appellate division or a judge of the court of appeals where the decision of the appellate division is unanimous in the same manner and subject to the same limitations not inconsistent herewith as is now provided in civil actions. It shall not be necessary to file exceptions to the rulings of the commission. The commission shall not be required to file a bond upon an appeal by it to the court of appeals. Otherwise such appeals shall be subject to the law and practice applicable to appeals in civil actions. Upon [the] final determination of such an appeal, the commission shall [make an award or decision] *enter an order* in accordance therewith.

§ 6. Section twenty-four of such chapter as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen is hereby amended to read as follows:

§ 24. Costs and fees. If the commission or the court before which any proceedings for compensation or concerning an award of compensation have

been brought, under this chapter, determines that such proceedings have not been so brought upon reasonable ground, it shall assess the whole cost of the proceedings upon the party who has so brought them. Claims for legal services in connection with any claim arising under this chapter, and claims for services or treatment rendered or supplies furnished pursuant to section thirteen of this chapter, shall not be enforceable unless approved by the commission. If so approved, such claim or claims shall become a lien upon the compensation awarded, but shall be paid therefrom only in the manner fixed by the commission. *In case an award is affirmed upon an appeal to the appellate division, the same shall be payable with interest thereon from the date when said award was made by the commission.*

§ 7. Section twenty-seven of such chapter as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen and as amended by chapter six hundred and twenty-two of the laws of nineteen hundred and sixteen is hereby amended to read as follows:

§ 27. Depositing future payments. If an award under this chapter requires payment of *death benefits or other compensation* by an [employer of an insurance corporation] *insurance carrier or employer* in periodical payments[, and the nature of the injury makes it possible to compute the present value of all future payments with due regard for life contingencies], the commission may, in its discretion, at any time, *any provision of this chapter to the contrary notwithstanding*, compute and permit or require to be paid into the state fund an amount equal to the present value of all unpaid *death benefits or other compensation in cases in which awards are made for total permanent or permanent partial disability for a period of one hundred and four weeks or more*, for which liability exists, together with such additional sum as the commission may deem necessary for a proportionate payment of expenses of administering the fund so created. *The moneys so paid in for all death benefits or other compensation to constitute one aggregate and indivisible fund* [such moneys to constitute an aggregate trust fund]; and thereupon such employer or insurance carrier [corporation] shall be discharged from any further liability under such award and payment of the same as *provided by this chapter* shall be assumed by the special [trust] fund so created. *All computations made by the commission shall be upon the basis of the survivorship annuitants' table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and interest at three and one-half per centum per annum.*

[The moneys so paid into this fund shall constitute an aggregate trust fund] *Such special fund* [and] shall be kept separate and apart from all other moneys of the state fund, and shall not be liable for any *losses or expenses of administration of the state fund other than the expenses involved in the administration of such* [trust] *special fund, nor shall the state fund be charged with the losses or expenses of the aggregate special fund beyond the amount of such special fund.*

*The commission may in like manner, in its discretion, commute and permit or require to be paid, into said aggregate special fund, by one or more resolutions one or more awards computable under this section.*

*Any portion of such special fund may pursuant to a resolution of the commission approved by the superintendent of insurance be invested in any of the*

*securities in which a life insurance corporation may invest its assets as provided in section one hundred of the insurance law.*

§ 8. Section twenty-nine of such chapter, as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen and amended by chapter six hundred and twenty-two of the laws of nineteen hundred and sixteen, is hereby amended to read as follows:

§ 29. Subrogation to remedies of employees. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, shall, before any suit or *any award* [claim] under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such elections shall be evidenced in such manner as the commission may by rule or regulation prescribe. If [he] *such injured employee, or in case of death, his dependents*, elect to take compensation under this chapter, [the cause of action against such other shall be assigned] *the awarding of compensation shall operate as an assignment of the cause of action against such other* to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. Wherever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian, as the commission may determine by rule in each case.

§ 9. Section fifty of such chapter, as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen and amended by chapter three hundred and sixteen of the laws of nineteen hundred and fourteen and chapter six hundred and twenty-two of the laws of nineteen hundred and sixteen, is hereby amended to read as follows:

§ 50. Security for payment of compensation. An employer shall secure compensation to his employees in one of the following ways:

1. By insuring and keeping insured the payment of such compensation in the state fund, or

2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the busi-

ness of workmen's compensation insurance in this state. If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association and such information regarding the policies as the commission may require.

3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter. *The commission may also require an agreement on the part of an employer to pay any awards commuted under section twenty-seven of this act into the special fund of the state fund, as a condition of his being allowed to remain uninsured pursuant to this section.* The commission shall have the authority to revoke its consent furnished under this section at any time for good cause shown.

If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of non-compliance to be recovered in an action brought by the commission.

The commission may, in its discretion, for good cause shown, remit any such penalty, provided the employer in default secure compensation as provided in this section.

§ 10. Subdivision four of section ninety-seven of such chapter is hereby amended to read as follows:

4. If the amount of premiums collected from any employer at the beginning of any period of [six] *twelve* months is ascertained and calculated by using the estimated expenditure of wages for the period of time covered by such premium payment as a basis, an adjustment of the amount of such premium shall be made at the end of such [six] *twelve* months, and the actual amount of such premium shall be determined in accordance with the amount of the actual expenditure of wages for such period; and, if such wage expenditure for such period is less than the amount on which such estimated premium was collected, such employer shall be entitled to receive a refund from the state insurance fund of the difference between the amount so paid by him and the amount so found to be actually due, or to have the amount of such difference credited on succeeding premium payments, at his option; and if such actual premium, when so ascertained, exceeds in amount a premium so paid by such employer at the beginning of such [six] *twelve* months, such employer shall immediately upon being advised of the true amount of such premium due forthwith pay to the treasurer of the state an amount equal to the difference between the amount actually found to be due and the amount paid by him at the beginning of such [six] *twelve* months period.

§ 11. This act shall take effect July first, nineteen hundred and seventeen.

Approved June 1.

## Chapter 712.

**An Act to amend the prison law, in relation to the retirement of guards and other employees in state prisons and reformatories.**

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Article sixteen and sections four hundred and twenty and four hundred and twenty-one of chapter forty-seven of the laws of nineteen hundred and nine, entitled "An act relating to prisons, constituting chapter forty-three of the consolidated laws," are hereby renumbered, respectively, article seventeen and sections four hundred and fifty and four hundred and fifty-one, and such chapter is hereby amended by inserting therein a new article, to be article sixteen, to read as follows:

## ARTICLE 16.

**RETIREMENT OF GUARDS AND OTHER EMPLOYEES OF STATE PRISONS AND REFORMATORIES.**

Section 410. When guards and other employees may be retired.

411. Retirement subject to revocation of governor.

§ 410. When guards and other employees may be retired. A guard or other employee in a state prison or reformatory who shall have served a term of employment of thirty years, either wholly in such prison or reformatory or partly therein and partly in another prison or reformatory or in a state hospital or penitentiary, either in one consecutive term or in two or more terms which shall together amount to a total period of employment of thirty years, may, if unable to perform his regular duties in a manner satisfactory to the superintendent of prisons or superintendent of reformatories, as the case may be, be retired as hereinafter provided at one-half the salary paid to him for the year immediately preceding such retirement. Such payment shall in no case exceed one thousand dollars per annum and shall be payable out of moneys appropriated by the state for the salary of such guard or employee, and shall not be revoked, diminished or subject to the claims of creditors. Such guard or employee may be retired when such action shall be in the interest of the state in the following manner: A guard or employee in a state prison, by the superintendent of prisons, a guard or employee in a state reformatory, by the board of managers of such reformatory, on the recommendation of the superintendent of reformatories.

§ 411. Retirement subject to revocation of governor. The retirement of a guard or employee, pursuant to this article, shall be subject at any time to revocation by the governor, who shall serve a notice of such revocation on the superintendent of state prisons, or the board of managers of the state reformatory making such retirement, and thereupon such retirement and all payments on account thereof shall cease. Upon such revocation such guard or employee shall be entitled to reassume his duties in the state prison or reformatory from which he was retired at the salary or compensation received by him at the time of retirement.

§ 2. This act shall take effect immediately.

Approved June 1.

## Chapter 721.

An Act to amend the labor law, in relation to floor area and required exits.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision two of section seventy-nine-a of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as added by chapter four hundred and sixty-one of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

2. Floor area and required exits. The term floor area as used in this section [signifies] means the entire space between fire walls, or between a fire wall and an exterior wall of a building, or between the exterior walls of the building where there is no intervening fire wall. From every floor area there shall be not less than two means of exit remote from each other, one of which on every floor above the ground floor shall be an interior enclosed fireproof stairway or an exterior enclosed fireproof stairway, and the other shall be such a stairway or a horizontal exit. No point in any floor area in an unsprinklered building shall be more than one hundred feet distant from the entrance to one such means of exit, and in a sprinklered building shall be more than one hundred and fifty feet distant from the entrance to one such means of exit. Whenever any floor area exceeds five thousand square feet there shall be provided at least one additional means of exit as hereinbefore described for each five thousand square feet [or part thereof] in excess of five thousand square feet, except where the industrial commission shall otherwise prescribe. In every building over one hundred feet in height there shall be at least one exterior enclosed fireproof stairway which shall be accessible from any point in the building.

§ 2. This act shall take effect immediately.

Approved June 4.

## Chapter 749.

An Act to amend the labor law, in relation to the bureau of employment, and making an appropriation therefor.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Section sixty-six-i and sixty-six-j of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as added by chapter one hundred and eighty-one of the laws of nineteen hundred and fourteen, are hereby amended to read, respectively, as follows:

§ 66-i. Departments. The [commissioner of labor] state industrial commission may organize in any branch office separate departments with separate entrances for men[,] and women[, and juveniles;] and shall organize in each branch, located in cities of the first and second class, a separate juvenile placement department. These departments for men and women may be subdivided into a division for farm labor and such other divisions for [different] other classes of work as [may] in [his] its judgment may be required.

§ 66-j. Juveniles. [Applicants for employment who are between the ages of fourteen and eighteen years shall register upon special forms provided by the commissioner of labor. Such applicants upon securing their employment certificates as required by law, may be permitted to register at a public or other recognized school and when forms containing such applications are transmitted to a public employment office they shall be treated as equivalent to a personal registration. The superintendent of each public employment office shall co-operate with the school principals in endeavoring to secure suitable positions for children who are leaving the schools to begin work. To this end he shall transmit to the school principals a sufficient number of application forms to enable all pupils to register who desire to do so; and such principals shall acquaint the teachers and pupils with the purpose of the public employment office in placing juveniles. The advisory committee shall appoint special committees on juvenile employment which shall include employers, workmen, and persons possessing experience or knowledge of education, or of other conditions affecting juveniles. It shall be the duty of these special committees to give advice with regard to the management of the public employment offices to which they are attached in regard to juvenile applicants for employment. Such committees may take steps either by themselves or in co-operation with other bodies or persons to give information, advice and assistance to boys and girls and their parents with respect to the choice of employment and other matters bearing thereon.] *Juvenile placement departments shall be established in connection with the branch office of the bureau of employment. The purposes and function of such juvenile placement departments shall be to provide information concerning vocational and trade training, the conditions and processes in industry to give advice tending to help keep juveniles in school, and assist in such other ways as will contribute to the welfare of juveniles. When juveniles, after leaving school, are seeking positions, the juvenile placement department shall use its efforts to procure the best opportunity for such applicants in accordance with the state law regulating work certificates and age limits. The state industrial commission shall appoint an advisory committee composed of representatives of employers, employees, the board of education, and such other persons as are interested in juvenile placement work, for the purposes of advising and assisting in the work of each such department. The supervisor and all other employees in this department shall be selected from special civil service lists.*

§ 2. The sum of fifteen thousand dollars (\$15,000), or so much thereof as may be necessary, is hereby appropriated out of any money in the treasury not otherwise appropriated to defray the expenses incurred by the state industrial in carry.\* out the provisions of sections sixty-i and sixty-six-j of the labor law as amended by this act, payable by the state treasurer on the warrant of the comptroller on the certificate of such commission.

§ 3. This act shall take effect immediately.

Approved May 15.

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\* So in original.



## Chapter 769.

## An Act to amend the highway law, in relation to motor vehicles.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

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§ 7. Such chapter is hereby amended by adding thereto two new sections, to be sections two hundred and ninety-a and two hundred and ninety-b, to read as follows:

§ 290-a. Suspension and revocation of a license of operator or chauffeur. The secretary of state may suspend any certificate of registration, or any license, issued to any person under the provisions of this article for any of the following causes: a. For a third or subsequent violation of the speed provisions of this article or ordinance or regulation made by competent local authority within one calendar year. b. Upon the conviction of the holder of a license of a felony under this act. c. Because of some physical or mental disability of the holder arising or discovered since the original issuance of the license or its renewal, or the disability of the holder by reason of intoxication or the use of drugs. d. Because of the gross negligence of the operator whereby person or property has been injured. e. For going away without stopping and giving his name and address after causing injury to any person or damage to any vehicle. f. Operating a motor vehicle in a manner showing a reckless disregard for life or property of others. Before revoking such certificate or license, the holder thereof shall be entitled to a hearing before the secretary of state or his deputy, upon ten days' notice in writing; on the revocation of a certificate of registration or license to operate, neither the license nor the certificate shall be reissued unless upon investigation the secretary of state shall determine that the operator may again be legally permitted to operate. Upon the conviction of a person for an offense involving a third violation of section two hundred and eighty-seven of this article, within one calendar year or of operating a motor vehicle while under the influence of intoxicating liquors or drugs, or of injuring a person or property by reason of gross negligence in operating, or of going away without stopping or giving his name and address after causing injury to any person or damage to any vehicle, the secretary of state may immediately revoke the license of the person so convicted and if any person convicted of any such offense shall appeal from the decision of such trial court, the secretary of state may suspend forthwith the license of the person so convicted and appealing and may order the license delivered to him and shall not reissue the same unless such person is acquitted upon such appeal, or unless the secretary of state in his discretion shall decide that such license shall be reissued. Whenever any license or certificate shall have been revoked under the provisions of this article no new license or certificate shall be issued unless by the secretary of state to such person until after thirty days from the date of such revocation, nor thereafter except in the discretion of the secretary of state. Notice of revocation and suspension of any license or certificate of registration shall be transmitted forthwith by the secretary of state to the chief of police of the city or prosecuting officer of the locality in which the person whose license or certificate of registration so revoked or suspended, resides.

§ 290-b. Certificate by magistrate. Upon conviction of any operator or chauffeur of a violation of this article, for any reason specified in the last preceding section as a ground for suspension or revocation of a license of an operator or chauffeur, the magistrate or other officer before whom such operator or chauffeur has been convicted shall forthwith transmit to the secretary of state a certificate stating in detail the conviction and the reasons for such conviction, for such action as the secretary of state may determine under section two hundred and ninety-a of this act. Such certificate shall be presumptive evidence of the conviction of such operator or chauffeur.

§ 8. This act shall take effect July first, nineteen hundred and seventeen, excepting that applications for registration may be made, examinations held, and number plates, licenses and badges issued, at any time within ninety days prior to such date.

Approved June 6.

#### Chapter 770.

An Act to amend the general business law, in relation to definition of theatrical employment agency.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision three of section one hundred and seventy-one of chapter twenty-five of the laws of nineteen hundred and nine, entitled "An act relating to general business, constituting chapter twenty of the consolidated laws," as amended by chapter seven hundred of the laws of nineteen hundred and ten, is hereby amended to read as follows:

3. The term "theatrical employment agency" means and includes the business of conducting an agency, bureau, office or any other place for the purpose of procuring or offering, promising or attempting to provide engagements for circus, vaudeville, theatrical and other entertainments or exhibitions or performances, or of giving information as to where such engagements may be procured or provided whether such business is conducted in a building, on the street or elsewhere, *but such term does not include the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor.*

§ 2. This act shall take effect immediately.

Approved June 6.

#### Chapter 772.

An Act to amend the code of civil procedure, in relation to the jurisdiction of justices of the peace.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision one of section two thousand eight hundred and sixty-three of the code of civil procedure, is hereby amended to read as follows:

1. Where the people of the state of New York are a party except for one

or more fines or penalties not exceeding two hundred dollars, *or for premiums due the insurance fund under the workmen's compensation law not exceeding two hundred dollars.*

§ 2. This act shall take effect immediately.

Approved June 6.

**Concurrent Resolution Requesting State Industrial Commission to Investigate Working Conditions in Capitol and Other State Buildings of Albany.**

Resolved (if the Assembly concur), That the State Industrial Commission be and it is hereby requested to inspect the Capitol building and other buildings in the city of Albany where business of the State is transacted, for the purpose of ascertaining the conditions under which employees are working with respect to sanitation, hygiene and safety, and to report to the Legislature within thirty days its conclusions as to what provisions of the law, if any, they would declare violated were such buildings used for factory purposes.

Adopted January 3.

## INDEX OF BILLS RELATING TO LABOR IN THE LEGISLATIVE SESSION OF 1917

[Explanation.—Only the principal purpose and final stage of each bill are indicated; identical bills in Senate and Assembly are recorded as one; bills enacted into law are described in italic type; numbers in parentheses are "Printed," the others "Introductory," numbers. Abbreviations used are: S. or Sen. for Senate, A. or Assm. for Assembly, and Com. for Committee.]

### ADMINISTRATION OF LABOR LAWS

*To define terms of the Labor Law, including "factory," "mercantile establishment," etc., to bestow enforcement powers on local officers and to hold employers responsible for prohibited labor. Senator Carson, S. 523 (575), and Mr. Bewley, A. 146 (147, 1305, 1472). Approved May 31, as Chapter 694.*

*To amend the Workmen's Compensation Law generally. Senator Walters, S. 893 (1038, 2128, 2180, 2263), and Mr. Pratt, A. 1333 (1587). Approved June 1, as Chapter 705.*

*To create department of State police. Senator Mills, S. 310 (318, 815, 1003), and Mr. L. H. Wells, A. 896 (1001, 1187, 1801). Approved April 11, as Chapter 161.*

*To regulate service of orders and summonses on owners and agents under the Labor Law. Senator Boylan, S. 1045 (1233, 1721). Not approved by the Governor.*

*To provide that amendments of the Labor Law shall not diminish the powers and duties of local authorities of New York City except by specific provision. Senator Cotillo, S. 612 (692), and Mr. Bewley, A. 859 (954; S. 1677). Assm. passed; Sen. Labor and Industry Com.*

*To amend the Labor Law generally. Senator Carson, S. 1126 (1336, 2107), and Mr. Bewley, A. 1453 (1789, 2074, 2405). Sen. Labor and Industry Com.; Assm. Labor and Industries Com.*

*To define the term "agent" as used in the Labor Law. Mr. Ellenbogen, A. 1167 (1371), Labor and Industries Com.*

*To give courts of special sessions, except in city and county of New York and city of Albany, exclusive jurisdiction relative to misdemeanors under the Labor Law, or the Workmen's Compensation Law. Senator Carson, S. 1128 (1338), and Mr. Bewley, A. 1452 (1788). Sen. Codes Com.; Assm. Codes Com.*

*To revise general penalty for violation of Labor Law, Industrial Code, Rules of Industrial Commission and employment certificate requirements. Senator Carson, S. 1127 (1337), and Mr. Bewley, A. 1451 (1787). Sen. Codes Com.; Assm. Codes Com.*

*To require factory owners to report certain data and statistics quarterly to the State Industrial Commission with closing of factory as penalty for non-compliance. Mr. Whitehorn, A. 623 (673). Labor and Industries Com.*

## HEALTH AND SAFETY

## FABRICES AND MERCANTILE ESTABLISHMENTS

To regulate inclosures of counterweights and lighting of elevators. Senator Carson, S. 522 (574), and Mr. Bewley, A. 149 (150, 836). Approved May 17, as Chapter 532.

To increase floor distances from factory exits and to confer upon State Industrial Commission power to prescribe number of exits. Senator Carson, S. 525 (577), and Mr. Bewley, A. 150, (151, 1304). Approved June 4, as Chapter 721.

To permit trough water-closets, latrines or school sinks in factories in accordance with rules to be prescribed by State Industrial Commission. Senator Carson, S. 526 (578), and Mr. Bewley, A. 148 (149). Approved May 31, as Chapter 693.

To amplify rule making powers relative to fire alarm signal systems in factories and to vest same in board of standards and appeals for New York City and in State Industrial Commission for up-State. Senator Boylan, S. 1207 (1455). Approved May 23, as Chapter 634.

To require owners to report changes in physical surroundings of explosives magazines and to empower Governor to promulgate rules and regulations in time of war for explosives, combustibles, asphyxiating gases and corrosives. Senator Robinson, S. 1528 (2008, 2218). Approved May 23, as Chapter 620.

To provide for enforcement of regulations of New York City board of estimate and apportionment establishing building districts and prescribing location of trades and industries. Senator Lockwood, S. 1116 (1326), and Mr. Flamman, A. 1232 (1452). Approved May 22, as Chapter 601.

To empower cities, except Rochester, to regulate height and bulk of buildings and to restrict location of trades and industries. Senator Hill, S. 106 (106), and Mr. Fearon, A. 246 (249, 386; S. 1835). Approved May 15, as Chapter 483.

To bring fire marshal's office of New York City under fire commissioner as fire investigation bureau. Mr. Marsh, A. 1336 (1590, 1988, 2108). Approved May 22, as Chapter 604.

To require sterilization of second-hand material used for mattresses, upholstered box-springs and metal bed springs by a process approved by the Industrial Commission. Senator Graves, S. 1167 (1415, 1645), and Mr. A. Taylor, A. 1560 (1928, 2141; S. 2094). Vetoed by the Governor.

To exclude places owned or operated by public service corporations in defining mercantile establishments. Senator Walker, S. 1346 (1667; A. 2419). Not approved by the Governor.

To require factory windows above second story to be so constructed that exterior of sash and glass may be presented interiorly for cleaning. Senator Foley, S. 1474 (1913). Not approved by the Governor.

To limit requirement of fire alarm system and fire drill to factories in which twenty-five or more persons employed at manufacturing are so employed above the ground floor. Senator Boylan, S. 1178 (1427), and Mr. Mahony, A. 1515 (1886). Sen. passed; Assem. Labor and Industries Com.

To require removal of old paper or calcimine from walls of tenement or working rooms before repapering or recalcimining. Senator Halliday, S. 549 (606), and Mr. Bush, A. 417 (436). Assem. passed; Sen. Com. of the Whole.

To create a commission to investigate sickness and accidents among employees. Senator Graves, S. 545 (602), and Mr. Bewley, A. 791 (874). Sen. Finance Com.; Assm. Ways and Means Com.

To limit requirement that factory stairways extend to roof to cases where roof affords egress to nearby structure. Senator Carson, S. 524 (576), and Mr. Bewley, A. 147 (148). Sen. Labor and Industry Com.; Assm. Labor and Industries Com.

To prohibit manufacture of toilet articles, artificial flowers, feathers, hat ornaments and wearing apparel in tenements. Senator Wagner, S. 959 (1115), and Mr. Perlman, A. 1293 (1525, 2281). Sen. Labor and Industry Com.; Assm. Labor and Industries Com.

To regulate the inspection of steam boilers in New York City and to transfer their control from the department of police to the department of licenses. Senator Koenig, S. 1210 (1458, 2069). New York City Com.

To abolish manufacture in tenement houses. Mr. Shiplacoff, A. 1608 (2013). Labor and Industries Com.

To abolish use of basements or cellars as bakeries. Mr. Shiplacoff, A. 1622 (2041). Labor and Industries Com.

Same bill, Mr. Shiplacoff, A. 1687 (2171). Social Welfare Com.

To give State Industrial Commission rule-making power by way of alternative to provisions of Labor Law, § 79-a, relative to construction of new factory buildings. Mr. A. Taylor, A. 486 (514, 792, 1027). Labor and Industries Com.

To give State Industrial Commission rule-making power by way of alternative to provisions of Labor Law, § 79-b, relative to use of existing buildings as factories. Mr. A. Taylor, A. 487 (515, 1028). Labor and Industries Com.

To give State Industrial Commission rule-making power by way of alternative to provisions of Labor Law, § 79-c, relative to factory stairways, doors, windows and passageways. Mr. A. Taylor, A. 485 (513, 1026). Labor and Industries Com.

To permit factories upon which means of exit additional to existing fire-escapes are required to install and use outside safety devices operated with steel cables, when the State Industrial Commission consents. Mr. Fearon. A. 7 (7). Labor and Industries Com.

To increase the distance limit permitting use of plate glass in factory windows. Mr. Shannon, A. 1607 (2012). Labor and Industries Com.

To regulate exits and stairway enclosures in factory buildings heretofore erected (Labor Law, § 79-b). Mr. Whitehorn, A. 765 (846). Labor and Industries Com.

To require dividing fire wall and horizontal exits of specified requirements in factories more than six stories in height and more than five thousand square feet in area. Mr. Whitehorn, A. 764 (845). Labor and Industries Com.

#### RAILWAYS

To require automatic doors on fire-boxes of locomotives not having mechanical stokers. Senator G. F. Thompson, S. 199 (199, 641, 1838), and Mr. Parker, A. 347 (360, 1043). Approved May 5, as Chapter 370.

To empower Public Service Commission, Second District, to suspend opera-

tion of full crew railroad law during war and for six months thereafter, Senator E. R. Brown, S. 1497 (1948, 2134). Sen. passed; Assem. Railroads Com.

To establish full crew law for railroad engines engaged in yard or terminal switching service. Mr. J. M. Mead, A. 608 (658). Labor and Industries Com.

To require railroads to equip baggage cars with water-closets and washing facilities and to cleanse the cars at the end of their routes. Senator Whitney, S. 1141 (1373, 2037). Com. of the Whole.

To limit length of railroad train to not to exceed one-half mile. Mr. J. M. Mead, A. 609 (659). Railroads Com.

To prescribe qualifications of motormen for operating electric multiple unit trains. Senator Hill, S. 679 (758). Public Service Com.

To fix twenty-one years as minimum age for employment as railroad towerman, signalman, telegraph or telephone operator for movement of trains. Mr. Merritt, A. 762 (843). Codes Com.

#### STATE BUILDINGS

*Concurrent resolution for investigation of state capitol and other Albany buildings relative to sanitary and safe working conditions of state employees. Senator Sage, January 3. Adopted.*

#### WOMAN AND CHILD LABOR

*To prohibit employment of females in restaurants of cities of the first and second class more than nine hours a day or six days a week or between 10 p. m. and 6 a. m., with certain exceptions. Senator Graves, S. 376 (399, 1477, 1856), and Mr. Marsh, A. 734 (811, 1469, 2113, 2351). Approved May 17, as Chapter 535.*

To establish eight-hour day for females and male minors under eighteen years of age in factories and for females in mercantile establishments, business offices and restaurants, not excepting Christmas season and stock taking. Senator Lockwood, S. 581 (647), and Mr. Brennan, A. 875 (980). Sen. Labor and Industry Com.; Assem. Labor and Industries Com.

To limit work of female employees in restaurants or hotels to six days or fifty-four hours per week. Mr. Greenberg, A. 341 (354). Labor and Industries Com.

To limit female employees to forty-eight hours' work per week, except that females over thirty years of age may work sixty hours or less upon procuring physicians' certificates of health and ability. Mr. Leininger, A. 222 (224). Labor and Industries Com.

To permit night work of women in composing rooms of newspaper, printing and publishing establishments. Senator Ottinger, S. 1404 (1755). Not approved by the Governor.

To provide that limitation of hours of female employees in mercantile establishments shall not apply to manufacture of government military and naval supplies. Mr. Johnson, A. 1112 (1276). Labor and Industries Com.

To permit female employees over sixteen to work in mercantile establishments throughout the night in selling soft beverages and serving lunches. Mr. Soule, A. 1689 (2173). Labor and Industries Com.

*To establish and regulate juvenile placement departments in state employment offices. Senator Murphy, S. 109 (109), and Mr. Simpson, A. 228 (230). Approved June 5, as Chapter 749.*

*To provide for and regulate employment of school children in agricultural pursuits during continuance of war and to extend university scholarship periods on account of military, agricultural or industrial service. Senator E. R. Brown, S. 1496 (1947, 2060). Approved May 29, as Chapter 689.*

*To permit employment of children upward of twelve years of age in mercantile establishments, etc., of cities and villages of second or third class during summer vacation. Senator Wellington, S. 967 (1123). Labor and Industry Com.*

*To raise age minimums relative to employment of minors in factories to sixteen and eighteen years respectively. Mr. Shiplacoff, A. 1688 (2172). Labor and Industries Com.*

*To raise the age limit for commitment of minors found in employments or acts dangerous to life, health or morals under Penal Law, §§ 685, 686, to eighteen years. Mr. G. T. Davis, A. 597 (647). Codes Com.*

*To further regulate and restrict employment of children in streets and public places by increasing age minimums for boys, by including newspaper routes and bootblacking, by adding enforcement penalties, etc. Mr. Goodman, A. 1458 (1794). Labor and Industries Com.*

*To regulate school attendance and school record certificates. Senator Lockwood, S. 446 (480), and Mr. Tallett, A. 354 (367, 583, 923, 1302, 1477). Approved May 29, as Chapter 563.*

*To amend the compulsory education law generally. Mr. Goodman, A. 1479 (1829, 2263), and A. 1480 (1830, 2269, 2348). Lost.*

*To require local health authorities to certify to State Department of Labor the evidence of age accepted in issuing employment certificates and to transmit to local school superintendents weekly lists of children granted or refused certificates, also to require State Department of Labor to transmit to local school superintendents monthly lists of children found working illegally, Senator Cromwell, S. 1180 (1429, 2025). Approved May 17, as Chapter 536.*

*To revise the penalty for violation of children's employment certificate requirements. Senator Carson, S. 1129 (1337), and Mr. Bewley, A. 1451 (1787). Sen. Codes Com.; Assm. Codes Com.*

*To regulate children's employment certificates and extend their age limit to eighteen years. Mr. Goodman, A. 1457 (1793). Labor and Industries Com.*

*Concurrent resolution for constitutional amendment empowering the Legislature to prescribe living wages for women and children. Mr. Hamill, A. 126 (126). Judiciary Com.*

#### MOTHERS' AND OLD AGE PENSIONS

*To regulate reports and expenses of local boards of child welfare. Senator Sage, S. 1566 (2132). Approved May 18, as Chapter 551.*

*To establish board of child welfare for county of Dutchess. Senator Turner, S. 239 (240, 976, 1640, 1833), and Mr. Gardner, A. 157 (158, 287, 1394, 1656). Approved May 4, as Chapter 354.*



Practically indetical bill, Senator Towner, S. 57 (57). Internal Affairs Com.

To extend widows' pension system to widows of aliens resident of State at time of death if children are natives of United States. Senator Cotillo, S. 1133 (1343), and Mr. Perlman, A. 131 (131). Sen. Cities Com.; Assm. Social Welfare Com.

To extend widows' pension system to widows of aliens resident of state at time of death if children are natives of New York. Mr. Twomey, A. 470 (490, 2045). Assm. passed; Sen. Third Reading.

To amend the General Municipal Law in relation to local boards of child welfare. Mr. Whitehorn, A. 47 (47, 1341). General Laws Com.

To enable boards of welfare to grant allowances to dependent citizens sixty-five years of age and upwards. Mr. Shapiro, A. 37 (37). General Laws Com.

### HOURS OF WORK

[See also Woman and Child Labor]

To suspend hour provisions of Labor Law and to empower State Industrial Commission to regulate hours of labor during continuance of war. Senator E. R. Brown, S. 1495 (1946, 1979, 2135, 2149). Vetoed by the Governor.

To empower State Industrial Commission to modify or suspend during war crisis Labor Law restrictions relative to employment and hours of work. Senator Carson, S. 1392 (1743), and Mr. Johnson, A. 1684 (2168, 2276). Sen. Labor and Industries Com.; Assm. laid aside.

Similar bill, Mr. Johnson, A. 1659 (2115). Labor and Industries Com.

To include masters, mates and pilots of steam vessels operated by the state or a municipality under, and to exclude mechanics of state institutions from, the protection of the eight-hour law. Senator G. L. Thompson, S. 840 (963, 1191; A. 2223). Vetoed by the Governor.

To abolish twelve-hour shift for firemen in state hospitals. Senator G. L. Thompson, S. 342 (354, 454, 1480, 1646), and Mr. Murphy, A. 513 (547, 1983, 2110). Approved April 30, as Chapter 286.

To regulate hours and sleeping apartments in pharmacies and drug stores. Senator Carson, S. 1129 (1339), and Mr. Bewley, A. 1450 (1786). Sen. Public Health Com.; Assm. Public Health Com.

To establish eight-hour day for New York City employees in labor class. Mr. Schimmel, A. 1438 (1753). Judiciary Com.

To empower the State Industrial Commission to make variations permitting overtime in factories to make up loss of production due to accidental failure of machinery to operate. Senator Carson, S. 595 (661), and Mr. Bewley, A. 151 (152). Sen. Labor and Industry Com.; Assm. Labor and Industries Com.

To prohibit overtime in excess of two hours per day for all classes of employees except in case of extraordinary emergency or when life or property is in imminent danger and to require payment at rate of time and a half for such excess. Senator Gilchrist, S. 554 (617). Labor and Industry Com.

## ONE DAY OF REST IN SEVEN

To extend day of rest law to pharmacy or drug store employees. Senator Carson, S. 1129 (1339), and Mr. Bewley, A. 1450 (1786). Sen. Public Health Com.; Assm. Public Health Com.

To extend day of rest law to pharmacies, drug stores, restaurants and lunch rooms. Mr. McNab, A. 108 (108). Labor and Industries Com.

To further protect employees in right to one day of rest in seven. Mr. McNab, A. 107 (107). Labor and Industries Com.

To apply day of rest law to superintendents or foremen of factories or mercantile establishments employing less than seven persons. Mr. Whitehorn, A. 1176 (1380). Labor and Industries Com.

To limit hours of dairy and milk product establishments under day of rest exemption to sixty-three per week and to extend such exemption to establishments employing less than seven persons, except ice cream plants. Mr. Everett, A. 900 (1005). Lost.

## SUNDAY WORK

To make the cultivation and handling of agricultural products lawful on Sunday during the war and until the first day of January after its termination. Senator Slater, S. 1570 (2158). Not approved by the Governor.

To penalize bootblackening on Sundays after 3 p. m. except within hotels of certain size and on ferry-boats. Senator Boylan, S. 238 (239, 394), and Mr. Mahony, A. 464 (490). Not approved by the Governor.

To prohibit sale of ice on Sunday, except on physician's certificate of necessity or for icing cars or perishable food products. Mr. Welsh, A. 1500 (1850). Codes Com.

To regulate and limit exceptions permitting public traffic in foods and other articles on Sundays. Senator Murphy, S. 730 (832), and Mr. F. A. Wells, A. 581 (619, 1188, 1766). Sen. Codes Com.; Assm. Codes Com.

To permit delicatessen dealers in cities of the first class to sell and supply cooked and prepared foods at any time on Sundays. Mr. Perlman, A. 957 (1076). Codes Com.

To eliminate non-disturbance of others as part of the defense to prosecution for labor on the first day of the week. Mr. Schimmel, A. 410 (426). Codes Com.

## HOLIDAYS AND VACATIONS

To change Labor Day from first to third Monday of September. Mr. Thayer, A. 1421 (1716). Judiciary Com.

To grant two weeks' annual vacation with pay to New York City employees in labor class. Mr. Schimmel, A. 1438 (1753). Judiciary Com.

## LEGAL RIGHTS

## WORKMEN'S COMPENSATION

To amend the Workmen's Compensation Law generally. Senator Walters, S. 893 (1038, 2128, 2189, 2263), and Mr. Pratt, A. 1333 (1587). Approved June 1, as Chapter 705.

To amend the Workmen's Compensation Law generally. Senator Ramserger, S. 1193 (1442), and Mr. Ryan, A. 841 (936, 1446). Sen. Judiciary Com.; Assm. Judiciary Com.

To amend the Workmen's Compensation Law generally. Mr. Shiplacoff, A. 1214 (1427). Judiciary Com.

To give justices of the peace cognizance of a civil action for a premium due the state insurance fund where such premium does not exceed two hundred dollars. Senator Newton, S. 1357 (1690, 1877). Approved June 6, as Chapter 772.

To fix minimum surplus of mutual employers' liability and workmen's compensation insurance corporations which transact other kinds of insurance. Senator Towner, S. 827 (950, 1413), and Mr. Coffey, A. 1159 (1340, 1546; S. 1544, 1780, 1841). Approved April 26, as Chapter 264.

To prescribe the method of computing casualty or surety insurance corporation reserves. Senator Towner, S. 758 (862), and Mr. Coffey, A. 1082 (1242). Approved May 1, as Chapter 298.

To enable domestic mutual employers' liability and workmen's compensation corporations to merge or consolidate. Senator Towner, S. 1294 (1597), and Mr. Coffey, A. 1652 (2095). Approved May 1, as Chapter 299.

To extend Workmen's Compensation Law retroactively to case of a certain Sing Sing prison guard. Senator Slater, S. 35 (35), and Mr. Law, A. 60 (340). Approved March 1, as Chapter 33.

To extend Workmen's Compensation Law to employees of State prisons and reformatories. Senator Slater, S. 34 (34), and Mr. Law, A. 59 (59, 2227). Not approved by the Governor. Similar provision enacted as part of Chapter 705, above.

To elect on behalf of State to subject all State employees to provisions of Workmen's Compensation Law. Senator Walters, S. 1034 (1222), and Mr. Law, A. 1392 (1672). Sen. passed; Assm. Judiciary Com.

To bring employment of a certain quarantine station employee retroactively within coverage of the Workmen's Compensation Law. Senator Cromwell, S. 925 (1082). Labor and Industry Com.

To create a commission to investigate sickness and accident among employees. Senator Mills, S. 879 (1024), and Mr. Coffey, A. 1221 (1434). Sen. Finance Com.; Assm. Ways and Means Com.

To establish state system of insurance for employees in cases of death, sickness and accident not covered by Workmen's Compensation Law. Senator Mills, S. 69 (69, 365). Judiciary Com.

To extend coverage of Workmen's Compensation Law to other than accidental injuries and to injuries not arising out of employment. Mr. Kelly, A. 23 (23). Judiciary Com.

To extend coverage of the Workmen's Compensation Law to all kinds and natures of employment. Mr. Perlman, A. 29 (29). Judiciary Com.

To subject the premium rates of the State Insurance Fund to approval of the superintendent of insurance. Senator Newton, S. 1554 (2083). Vetoed by the Governor.

To except police and fire forces of city of Rochester from Workmen's Compensation Law. Senator Mullan, S. 1053 (1241). Not approved by the Governor.

To provide death benefits under Workmen's Compensation Law for

dependent illegitimate children. Senator Ramsperger, S. 1410 (1773). Sen. Judiciary Com.

*Similar provision in A. 1333 (1587) and S. 893 (1038, 2128, 2189, 2263, 2278), amending Workmen's Compensation Law generally. Latter approved June 1, as Chapter 705.*

To permit injured employee to select his own physician under Workmen's Compensation Law and physician to recover fee in courts. Mr. Evans, A. 389 (405). Judiciary Com.

To require employer to provide medical treatment, etc., for ninety days after injury, to permit employee to select his own physician and physician to recover fee in courts. Mr. Schimmel, A. 409 (425). Judiciary Com.

To allow workmen's compensation from date of injury. Mr. Larney, A. 563 (601). Judiciary Com. Compare provision in Chapter 705.

To allow compensation from seventh day of disability, to require notice of injury within five days and to permit presentation of claim after first seven days. Senator Cotillo, S. 1393 (1744). Labor and Industries Com.

To allow compensation from day of disability, to require notice of injury within five days and to permit presentation of claim after first seven days. Mr. Perlman, A. 31 (31). Judiciary Com.

To fix compensation for loss of two or more digits of right hand, in whole or in part, by same accident. Mr. Ahern, A. 1503 (1874). Judiciary Com. Compare provision in Chapter 705 above.

To provide 15 per cent increase or decrease of workmen's compensation for failure of employer or employee to provide or use safeguards or observe rules. Mr. A. Taylor, A. 488 (516). Judiciary Com.

To prohibit appeals from workmen's compensation awards not exceeding forty-four dollars per month. Mr. Flammann, A. 154 (155). Judiciary Com.

To abolish direct settlements between employer and employee and to provide for payment of all workmen's compensation by the Commission. Senator Cotillo, S. 1426 (1810). Judiciary Com.

To re-establish Workmen's Compensation Commission. Senator Foley, S. 616 (696), and Mr. Ryan, A. 842 (937, 1442). Sen. Labor and Industry Com.; Assem. Judiciary Com.

To eliminate workmen's compensation functions of State Industrial Commission and to abolish office of third deputy commissioner. Senator Foley, S. 617 (697), and Mr. Ryan, A. 843 (938, 1439). Sen. Labor and Industry Com.; Assem. Labor and Industries Com.

To provide plan, alternative to Workmen's Compensation Law, voluntary for employee, with coverage of vocational diseases and assessment of employee. Mr. Evans, A. 390 (406). Judiciary Com.

To increase workmen's compensation rate for employees receiving ten dollars a week or less to 100 per cent of wages. Mr. Larney, A. 561 (599). Judiciary Com.

To fix disability and death benefit awards under Workmen's Compensation Law at 100 per cent of wages and otherwise to increase compensation. Mr. Perlman, A. 30 (30). Judiciary Com.

Concurrent resolution for constitutional amendment defining relations of sections 19 and 19 of article 1 of Constitution, permitting workmen's compensation for occupational disease and otherwise modifying legislature's powers. Mr. Perlman, A. 33 (33). Assem. passed; Sen. Judiciary Com.

## EMPLOYERS' LIABILITY

To regulate time limit for administrator's or executor's action for causing death by negligence. Senator Newton, S. 1144 (1385). Codes Com.

*To require provision in employer's liability insurance policies that insolvency or bankruptcy of insured shall not release insurance carrier. Senator Boylan, S. 912 (1067), and Mr. McCue, A. 259 (261, 1468). Approved May 17, as Chapter 524.*

## WAGES

To create minimum wage commission and to provide for minimum wage boards. Senator Wagner, S. 847 (970). Labor and Industry Com.

Similar bill, Mr. Goldstein, A. 1024 (1159). Social Welfare Com.

Senate resolution for joint committee to investigate question of minimum wage for women. Senator Cutillo April 5. Finance Com.

Concurrent resolution for constitutional amendment empowering Legislature to prescribe living wages for women and children. Mr. Hamill, A. 126 (126). Judiciary Com.

To extend prevailing rate of wages provision of Labor Law, § 3, to masters, mates and pilots of steam vessels operated by the state or a municipality. Senator G. L. Thompson, S. 840 (963, 1191; A. 2223). Vetoed by the Governor.

To require highway contractors to give bond to pay for supplies, materials and labor. Senator Robinson, S. 1111 (1321), and Mr. Davies, A. 1454 (1790). Sen. Internal Affairs Com.; Assem. Internal Affairs Com.

To require municipal contractors to give bond to observe contract terms and to pay for supplies, materials and labor. Senator Robinson, S. 1110 (1320), and Mr. Davies, A. 1455 (1791). Sen. Judiciary Com.; Assem. General Laws Com.

To require canal contractors to give bond for monthly payment of mechanics as well as laborers and to extend period for action against sureties to six months. Mr. McNab, A. 628 (678). Assem. passed; Sen. Canals Com.

To permit allowances for increase or decrease in prevailing rates of wages between date of execution and date of completion of public works contracts. Mr. Bewley, A. 794 (877). Labor and Industries Com.

To require New York City to pay weekly in cash the wages of all employees paid at an hourly, daily or weekly rate. Mr. McDonald, A. 737 (814). Cities Com.

To regulate costs recoverable by working men and women in actions for wages or materials. Mr. Greenberg, A. 1512 (1883). Codes Com.

To permit judgment creditor to levy against wages, income, etc., of judgment debtor without waiting for return of judgment unsatisfied. Senator Gilchrist, S. 1174 (1422, 1789). Not approved by the Governor.

To make judgment debtors' wages, income, etc., in excess of \$4,000 per year liable in full for creditors' claims. Mr. Evans, A. 386 (402, 1080). Assem. passed; Sen. Codes Com.

To subject wages, income, etc., of judgment debtor amounting to nine dollars or more per week to execution. Senator Halliday, S. 642 (722), and Mr. H. J. Mitchell, A. 709 (776). Sen. Codes Com.; Assem. Codes Com.

To subject wages, income, etc., of judgment debtor amounting to twelve

dollars or more per week, or at that per diem rate for any portion of such week, to execution. Mr. Fullagar, A. 539 (573). Codes Com.

To limit execution for debt to wages, earning or salary of single person exceeding eighteen dollars, and of married person exceeding twenty-five dollars per week. Mr. Whitehorn, A. 475 (501, 1395). Codes Com.

#### LABOR ORGANIZATIONS

(See also Industrial disputes.)

To exclude the existence and operation of labor organizations from classification as illegal combinations or conspiracies. Senator Wagner, S. 255 (262), and Mr. Goodman, A. 554 (592). Sen. Codes Com.; Assm. Codes Com.

Similar bill, Mr. Callahan, A. 338 (351). Judiciary Com.

#### RAILROADS

To limit wearing of badges by railroad employees to conductors or collectors and wearing of uniforms to such as are furnished free and by mutual agreement. Mr. Merritt, A. 100 (100). Railroads Com.

#### GOVERNMENT EMPLOYEES

##### GENERAL

*To permit absence of state and municipal officers and employees on military and naval duty without prejudice to position, privilege or pay. Mr. Fenner, A. 481 (509, 637, 1645, 1816; S. 1790, 1981, 2050, 2133, 2143, 2214). Approved May 10, as Chapter 435.*

Similar bill, Senator Stivers, S. 1072 (1264). Military Affairs Com.

Similar bill, Mr. Welsh, A. 1501 (1851). Assm. passed; Sen. Military Affairs Com.

Similar bill, providing also for detail of national guardsmen and naval militiamen to agricultural, industrial or other service. Senator E. R. Brown, S. 1498 (1954). Killed.

To restrict privileges of state and municipal employees absent on military and naval duty to employees at present members of national guard or naval militia. Senator Stivers, S. 1505 (1974). Military Affairs Com.

*To require public employees to take and file constitutional oath. Mr. Malone, A. 1484 (1834). Approved May 19, as Chapter 574.*

*To provide for the removal of public officers or employees for treasonable or seditious acts or utterances. Senator Slater, S. 1271 (1570). Approved May 8, as Chapter 416.*

To create a commission to inquire into the pensioning of public employees. Senator Mullan, S. 1307 (1615), and Mr. Brennan, A. 1732 (2323). Sen. Finance Com.; Assm. Ways and Means Com.

Concurrent resolution for constitutional amendment to give Spanish War and Philippine veterans and marine corps veterans preference in civil service. Senator Gilchrist, S. 82 (82, 1831), and Mr. Martin, A. 232 (234). Adopted May 9.

To give veteran soldiers and firemen preference in retention in civil service.

Senator Cromwell, S. 1000 (1173), and Mr. Leininger, A. 965 (1094). Sen. Civil Service Com.; Assm. Judiciary Com.

To subject rules for classification of classified civil service to approval of Legislature instead of Governor. Senator Lawson, S. 825 (948). Civil Service Com.

To limit civil service appointments to citizens of New York State when appropriate lists can be made. Senator Gilchrist, S. 78 (78). Civil Service Com.

To permit civil service employees to organize for improvement of their conditions and to petition the Legislature and their executive superiors. Senator Gilchrist, S. 4 (4), and Mr. Blakely, A. 1600 (2006). Sen. Judiciary Com.; Assm. Judiciary Com.

To require certification and appointment of person standing first on civil service promotion list. Senator Walker, S. 250 (257). Civil Service Com.

To regulate promotions and transfers in the competitive civil service. Mr. Fertig, A. 49 (49). Judiciary Com.

To eliminate provisions relative to transfers in the civil service and to prohibit exemption of positions once placed in competitive class. Senator Murphy, S. 810 (934, 1687, 1927), and Mr. Fertig, A. 48 (48, 2208). Sen. passed; Assm. Judiciary Com.

To permit promotion of person on civil service list accepting position in grade inferior to grade for which qualified without additional examination. Senator Gilchrist, S. 370 (385), and Mr. Mahony, A. 565 (603). Sen. passed; Assm. Judiciary Com.

To provide for suspension and reinstatement of civil service employees whose positions are abolished or made unnecessary. Senator Walker, S. 680 (759). Civil Service Com.

Similar bill, Mr. Gould, A. 316 (323). Judiciary Com.

To regulate removal, suspension and reinstatement of public employees. Mr. E. H. Miller, A. 778 (861). Judiciary Com.

#### STATE EMPLOYEES

*To establish system of service records and ratings for state employees. Senator Gibbs, S. 1487 (1938, 2038). Approved May 25, as Chapter 653.*

To create standard titles, duties, qualifications, grades and compensation in state civil service. Senator Gibbs, S. 13 (13). Civil Service Com.

To regulate imposition of penalties for inefficiency and offenses against duty, discipline or good behavior in the competitive class of the state civil service. Senator Gibbs, S. 140 (142). Civil Service Com.

Concurrent resolution for investigation of State Capitol and other buildings relative to sanitary and safe working conditions of state employees. Senator Sage, January 3. Adopted.

Senate resolution for continuing investigation of state civil service by committee after adjournment of Legislature. Senator Mullan, March 28. Adopted.

*To regulate salaries and wages of state hospital officers and employees. Senator G. L. Thompson, S. 342 (354, 454, 1480, 1646), and Mr. Murphy, A. 513 (547, 1983, 2110). Approved April 30, as Chapter 286.*

*To compensate employees of state hospitals for extra services under, L.*

1902, ch. 26. *Senator G. L. Thompson, S. 1429 (1814, 2053, 2151), and Mr. Murphy, A. 1700 (2291). Approved June 5, as Chapter 741.*

To increase salaries of employees in engineer's department of State hospitals. *Senator G. L. Thompson, S. 1515 (1995, 2057). Finance Com.*

To provide retirement pension system for state prison and reformatory employees. *Senator Slater, S. 422 (462), and Mr. Law, A. 631 (689, 1119, 1281). Approved June 1, as Chapter 712.*

To provide retirement pensions at state expense for employees of house of refuge for juvenile delinquents in New York City. *Senator Cromwell, S. 93 (93). Finance Com.*

To re-enact L. 1916, ch. 438, providing retirement pension system for Civil War veterans in state civil service. *Mr. Ryan, A. 891 (996). Judiciary Com.*

To provide for retirement of Civil War veterans from state civil service without continuity of employment. *Mr. Shannon, A. 305 (312). Judiciary Com.*

To transfer state legislative positions to classified civil service. *Senator Gibbs, S. 117 (117). Civil Service Com.*

To elect on behalf of state to subject all state employees to provision of workmen's compensation law. *Senator Walters, S. 1034 (1222), and Mr. Law, A. 1392 (1672). Sen. passed; Assm. Judiciary Com.*

To fix salary minimum for state civil service employees. *Mr. Larney, A. 1380 (1636). Ways and Means Com.*

To provide for inquiries by the Attorney-General relative to public peace, safety and justice and for the appointment, etc., of employees therefor. *Senator Sage, S. 1589 (2194), and Mr. Machold, A. 1756 (2412). Approved May 21, as Chapter 595.*

To provide increased pay for state armory and arsenal employees according to length of service. *Mr. Straub, A. 1009 (1144). Not approved by the Governor.*

Similar bill, *Mr. F. A. Wells, A. 1065 (1220, 1871, 2070). Not approved by the Governor.*

To require that state armory employees shall be citizens of the United States and residents of New York of two years' standing and to give preference to national guardsmen. *Senator Foley, S. 1557 (2109), and Mr. Straub, A. 1283 (1515). Sen. Military Affairs Com.; Assm. Military Affairs Com.*

To establish State Printing Office and prescribe method of selecting employees therein. *Senator Boylan, S. 87 (87), and Mr. Mahony, A. 463 (489). Sen. Finance Com.; Assm. Public Printing Com.*

#### LOCAL EMPLOYEES IN GENERAL

To extend retirement and pension provisions to Civil War veterans employed in local, as well as in state service. *Senator Dowling, S. 726 (828, 2035), and Mr. Smith, A. 858 (953, 1440, 2350, 2395). Approved June 6, as Chapter 768.*

To give Spanish War veterans preference in local civil service appointments and promotions. *Senator Hill, S. 717 (802). Civil Service Com.*



*To provide that contents of destroyed slot machine shall go to police pension or poor fund in cities and villages. Mr. G. T. Davis, A. 596 (646). Approved April 16, as Chapter 188.*

*To abolish two years' residence qualification for village policemen. Mr. Law, A. 1685 (2169). Approved May 4, as Chapter 359.*

*To require cities to furnish free uniforms once a year to policemen, firemen and other employees required to wear uniforms. Mr. Larney, A. 1381 (1637). Cities Com.*

*To require cities of the first class to furnish free uniforms in police and fire departments. Mr. McElligott, A. 949 (1068). Cities Com.*

*To provide a two platoon system and limit hours of duty in fire departments of cities of the first class. Senator Gilchrist, S. 3 (3), and Mr. Blakely, A. 3 (3). Sen. Cities Com.; Assem. Cities Com.*

*Practically identical bill, Mr. Ryan, A. 35 (35). Cities Com.*

*To limit daily hours of duty of policemen in cities of the third class to eight hours. Mr. Blakely, A. 287 (294). Cities Com.*

#### NEW YORK CITY

*To provide for absence of New York City officers and employees upon military or naval duty or training without loss of pay, privilege or position. Senator Lockwood, S. 895 (1040; A. 2237), and Mr. Marsh, A. 1258 (1490). Rejected by the Mayor.*

*To permit absence of employees of New York City and counties within its limits upon national Red Cross duty without loss of pay, privilege or position. Senator Cotillio, S. 1244 (1508), and Mr. Youker, A. 1591 (1964). Sen. passed; Assem. Cities Com.*

*To prohibit removal of New York City officers and employees except upon formal hearing with right of representation and court review. Mr. Schimmel, A. 1562 (1930). Cities Com.*

*To regulate rehearing of charges and reinstatement of dismissed New York City employees. Mr. Gould, A. 317 (324). Cities Com.*

*To increase salaries of New York City employees by annual increments of one hundred dollars until they amount to twelve hundred dollars. Mr. Shiplacoff, A. 1541 (1911). Cities Com.*

*To require New York City to pay weekly in cash the wages of all employees paid at an hourly, daily or weekly rate. Mr. McDonald, A. 737 (814). Cities Com.*

*To require New York City to furnish uniforms free to employees receiving not to exceed \$1,000 salary per annum. Mr. McDonald, A. 736 (813). Cities Com.*

*To establish eight-hour day for New York City employees in labor class with voluntary overtime at extra pay and with two weeks' annual vacation. Mr. Schimmel, A. 1438 (1753). Judiciary Com.*

*To establish general pension commission and fund for all New York City departments except department of education. Mr. Shapiro, A. 1028 (1163). Cities Com.*

*To shorten retirement period of Civil War veterans and to provide for retirement of incapacitated employees of New York City. Senator Lawson, S. 701 (787). New York City Com.*

To regulate retirement of Civil War veterans from civil service of New York City. Senator Gilchrist, S. 505 (549, 782), and Mr. Burr, A. 718 (795). Sen. passed; Assm. Cities Com.

Similar bill, Mr. Simpson, A. 747 (824). Cities Com.

To permit retirement of Spanish War or Philippine veterans from employ of New York City after twenty-five years' service. Senator Lawson, S. 401 (428). New York City Com.

To eliminate five-day limitation on grants of leave of absence to members of New York City police force. Senator Lawson, S. 809 (933), and Mr. Burr, A. 798 (889, 1792), Approved April 25, as Chapter 257.

To regulate number and salaries of New York City police captains detailed to act as inspectors. Senator Lockwood, S. 894 (1039), and Mr. Ellenbogen, A. 1231 (1451). Approved May 7, as Chapter 395.

To regulate objects and powers of "honor roll relief fund" of New York City police department. Senator Koenig, S. 1211 (1459), and Mr. Tudor, A. 1580 (1953). Approved May 22, as Chapter 606.

To regulate grades and increase salaries of New York City patrolmen. Mr. Klingmann, A. 265 (267). Cities Com.

To regulate time service record of water supply police transferred to New York City police department. Mr. Straub, A. 850 (945). Assm. passed; Sen. New York City Com.

To modify police pension system of New York City relative to age limit, forfeit and amount to widow or children. Senator Lawson, S. 11 (11, 679, 812). Com. of the Whole.

To increase pension of dependent parents or widow of New York City policeman killed or mortally injured in line of duty from six hundred dollars to eight hundred and fifty dollars per annum. Mr. E. H. Miller, A. 1574 (1942). Cities Com.

To extend rehearing and reinstatement provisions to persons dismissed while under probation for permanent employment as New York City patrolmen. Mr. Ryan, A. 612 (662). Cities Com.

Similar bill providing also for reinstatement of resigned persons. Mr. E. H. Miller, A. 779 (862). Cities Com.

To regulate age limit for retirement of members of New York City police force. Mr. Klingman, A. 267 (269). Cities Com.

To eliminate provision permitting New York City police commissioner to retire and pension members of force sixty years of age or over. Senator Carroll, S. 749 (853), and Mr. Klingmann, A. 1304 (1559). Sen. New York City Com.; Assm. Cities Com.

To permit reinstatement of former New York City policeman resigned without charges prior to January 1, 1913. Mr. Armstrong, A. 785 (868). Assm. passed; Sen. New York City Com.

To authorize police commissioner of New York City, to rehear charges against and reinstate John J. Donnelly as patrolman. Mr. Larney, A. 1031 (1166, 2047). Rejected by the Mayor.

To increase salaries of uniformed firemen and fire-boat pilots in New York City fire department. Mr. Straub, A. 907 (1012, 1548). Cities Com.

To increase salaries of New York City street cleaning employees. Senator Gilchrist, S. 982 (1137), and Mr. Shiplacoff, A. 1106 (1270). Sen. N. Y. City Com.; Assm. Cities Com.

Same bill, Senator Cotillo, S. 1132 (1342). N. Y. City Com.

To abolish 3 per cent deduction from pay of New York City street cleaning employees for relief and pension fund. Mr. Shiplacoff, A. 1723 (2314). Cities Com.

To permit addition of not to exceed two hundred and sixty-six lifters to Brooklyn street cleaning force. Senator Heffernan, S. 408 (435), and Mr. Farrell, A. 692 (759). Sen. New York City Com.; Assm. Cities Com.

To provide that moneys received from sale of New York City garbage shall not go into street cleaners' pension fund but into general fund. Mr. Meyer, A. 1234 (1454). Cities Com.

To provide for retirement of employees of public utilities owned, operated or controlled by New York City. Senator Cromwell, S. 1163 (1404). New York Cities Com.

To extend New York City retirement pension system to electrical subway commission and electrical control board employees transferred to city service. Senator Ottinger, S. 1470 (1893, 2049). Not approved by the Governor.

To vest appointment and control of janitors and other school employees of New York City in a commissioner of education as successor to board of education. Mr. Fertig, A. 114 (114). Cities Com.

### PRISON LABOR

*To empower Superintendent of State Prisons to acquire sites and employ prisoners at farm and other outside labor. Senator Wellington, S. 1279 (1581, 1857), and Mr. Wheeler, A. 1644 (2087). Approved May 7, as Chapter 391.*

*To regulate maintenance, etc., of convicts employed on public highways. Senator Whitney, S. 1150 (1392), and Mr. Pratt, A. 1429 (1724). Approved May 3, as Chapter 318.*

*To provide for employment of county jail prisoners at farm labor at almshouses or poor farms. Mr. Lord, A. 1650 (2093). Penal Institutions Com.*

### REGULATION OF TRADES AND OCCUPATIONS

*To empower cities, except Rochester, to regulate height and bulk of buildings and to restrict location of trades and industries. Senator Hill, S. 106 (106), and Mr. Fearon, A. 246 (249, 386; S. 1835). Approved May 15, as Chapter 483.*

*To redefine "theatrical employment agencies" so as to exclude business of managing entertainments, artists, etc., where such business only incidentally involves seeking employment therefor. Senator Walters, S. 1311 (1619). Approved June 6, as Chapter 770.*

*To amend the Highway Law relative to the licensing of operators, to require chauffeurs, owners and operators to notify Secretary of State of change of residence and to regulate the suspension or revocation of licenses. Senator Cromwell, S. 94 (94, 825, 1479, 1901, 2262), and Mr. Kelly, A. 143 (143, 884, 1189, 1540, 1817). Approved June 6, as Chapter 769.*

*To subject drivers of motor vehicles to registration, to empower Secretary of State to suspend or revoke licenses of chauffeurs and certificates of drivers, and to regulate law of the road, etc. Mr. Welsh, A. 130 (130, 1079, 1806, 2243, S. 2261). Assm. passed; Sen. Third Reading.*

To require chauffeurs or operators to remain on or immediately near motor vehicles being carried on ferry-boats. Mr. Ahern, A. 972 (1101). Assm. passed; Sen. Codes Com.

To limit license of chauffeurs to citizens of United States. Mr. La Frenz, A. 1379 (1635). Internal Affairs Com.

To create state motion picture department for regulation of motion picture business. Joint Legislative Committee, S. 1413 (1776, 2115, 2148), and A. 1695 (2232, 2383, 2393). Assm. passed; Sen. Judiciary Com.

To regulate qualifications of moving picture operators. Senator Walker, S. 993 (1162). Cities Com.

To require licensing, bonding and responsibility for employees in messenger service business. Senator Walker, S. 911 (1056), and Mr. Kelly, A. 1675 (2130). Sen. Judiciary Com.; Assm. Judiciary Com.

to create state board of examiners and to require journeymen electricians to take out state licenses. Senator Graves, S. 557 (620, 1481). Finance Com.

Similar bill, Mr. A. Taylor, A. 1078 (1233). General Laws Com.

To create state board of examiners of horseshoers with compulsory examination and registration powers. Senator Halliday, S. 1200 (1448), and Mr. Fenner, A. 1658 (2114). Sen. Judiciary Com.; Assm. Gen. Laws Com.

To prohibit operation of hand-organs, etc., in streets or public places except by persons incapacitated for labor by physical condition or deformity. Senator Daly, S. 1550 (2079). Codes Com.

To except employment agencies conducted by educational institutions for their students from the general business law provisions regulative of employment agencies. Senator Murphy, S. 111 (111), and Mr. Brennan, A. 549 (587). Sen. Judiciary Com.; Assm. General Laws Com.

## INDUSTRIAL EDUCATION

*To accept the benefits of the act of Congress for promotion of vocational education. Senator Lockwood, S. 773 (877, 1192). Approved May 21, as Chapter 576.*

*To provide military and vocational training for boys between sixteen and nineteen years of age. Senator Slater, S. 345 (357), and Mr. Welsh, A. 509 (543, 969). Approved March 15, as Chapter 49.*

## INDUSTRIAL DISPUTES

To prohibit blacklisting and misrepresentation. Mr. Farrell, A. 453 (479). Codes Com.

To provide that labor of a human being shall not be deemed a commodity or article of commerce. Mr. Bloch, A. 335 (348). Judiciary Com.

Similar bill, Mr. Callahan, A. 338 (351). Judiciary Com.

To provide that combinations or agreements in contemplation or furtherance of trade disputes shall not be deemed conspiracies, or in restraint of trade, or criminal, if not criminal for individuals. Mr. Whitehorn, A. 111 (111). Codes Com.

Similar bill, Senator Wagner, S. 131 (131), and Mr. Callahan, A. 338 (351). Sen. Judiciary Com.; Assm. Judiciary Com.

To make conspiracy to prevent another from exercising a lawful trade or calling or from doing other lawful act a felony. Mr. Smith, A. 1400 (1680). Codes Com.

To limit and regulate the issuance of temporary or preliminary injunctions especially in relation to labor disputes. Senator Wagner, S. 257 (264), and Mr. Goodman, A. 556 (594). Sen. Codes Com.; Assm. Codes Com.

To require an employer advertising for employees during a strike, lockout or other labor trouble to mention existence of disturbance. Mr. Whitehorn, A. 110 (110). Codes Com.

To create department of State police. Senator Mills, S. 310 (318, 815, 1003), and Mr. L. H. Wells, A. 896 (1001, 1187, 1801). Approved April 11, as Chapter 161.

To regulate private detective licenses by separate provisions relative to proprietors of agencies and independent or employee detectives. Senator Sage, S. 1162 (1403), and Mr. Machold, A. 1477 (1827). Sen. Judiciary Com.; Assm. Ways and Means Com.

To prohibit use of a body of armed men unauthorized by state law or keeping an armed force for hire; to regulate public detectives; to prescribe public control, citizenship and residence; and to make violation of act a felony. Mr. Whitehorn, A. 622 (672). Codes Com.

To permit persons who have been under-sheriffs or wardens to qualify as private detectives or become qualifying members of agencies. Mr. Goldstein, A. 1419 (1714). Not approved by the Governor.

#### MISCELLANEOUS

To create farms and markets department with power to aid in the supply of farm labor. Committee on Agriculture, S. 1381 (1714, 1849), and Mr. Witter, A. 1696 (2244). Approved June 9, as Chapter 802.

To establish compulsory reciprocal contractual relations and obligations of employment between public utility corporations and their employees. Mr. Meyer, A. 426 (445, 1731, 2233). Judiciary Com.

To regulate eviction of tenants occupying premises as servants or employees of landlords, especially janitors or superintendents of houses, and to extend the law to New York City. Mr. Shiplacoff, A. 447 (466). Codes Com.



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**STATE OF NEW YORK**  
**DEPARTMENT OF LABOR**  
**SPECIAL BULLETIN**

Issued Under the Direction of  
**THE INDUSTRIAL COMMISSION**  
**JOHN MITCHELL, Chairman**  
**EDWARD P. LYON**      **JAMES M. LYNCH**  
**LOUIS WIARD**      **HENRY D. SAYER**

**No. 85**  
**JULY, 1917**

**COURSE OF EMPLOYMENT**  
**IN NEW YORK STATE FROM**  
**1904 TO 1916**

Prepared by  
**THE BUREAU OF STATISTICS AND INFORMATION**

## Previous Publications Concerning Employment

Statistics of unemployment were published from 1897 to 1915. All such statistics were based on returns from trade unions. For the years 1897 and 1898, these were published only in the annual reports of the Bureau of Labor Statistics. From 1899 to 1913 summary figures were published quarterly in the Bulletin of that Bureau, which after 1900 became the Bulletin of the Department of Labor, with detailed annual figures in the annual reports of the Bureau of Labor Statistics. Beginning with 1913, statistics, or other information concerning unemployment, were published from time to time in the special Bulletins, constituting the present Bulletin series, of which Nos. 57, 58, 61, 69 and 73 dealt with unemployment.

From 1896 to 1905 a State Employment Bureau was maintained in New York City. The annual reports of this Bureau were published in the annual reports of the Bureau of Labor Statistics for the years 1896 to 1900, and in the annual reports of the Commissioner of Labor for 1901 to 1905. Concerning the abolition of that Bureau, see page 14 of the report of the Commissioner of Labor for 1905.

In 1914 the present Bureau of Employment was established in the Department of Labor with branch offices in different localities. Monthly summaries of the business of these offices have been published in the Official Bulletin of the Industrial Commission since October, 1915, and their statistics of registrations for work and calls for workers have been included in the Labor Market Bulletin since October, 1916. The annual report of the Bureau for 1915 appears in the Department report for that year.

Beginning with October, 1915, a monthly Labor Market Bulletin has been published, containing statistics of employment in representative manufacturing plants, of building activity in cities, and, since October, 1915, of the work of the State Bureau of Employment.

Of the publications above referred to, files of which may be found in many public libraries, the Department can now supply only the following:

*Bulletins:* Those not indicated as out of print on the inside page of the back cover of this Bulletin.

*Annual Reports of Bureau of Labor Statistics:* 1900, 1902-4, 1907, 1910-12.

*Annual Reports of the Commissioner of Labor:* 1902-7, 1909-10, 1913.

*Annual Report of the Department of Labor:* 1915.



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1917



**STATE OF NEW YORK**  
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<b>JOHN MITCHELL, Chairman</b>	
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## **THE COURSE OF EMPLOYMENT IN NEW YORK STATE FROM 1904 TO 1916**

This bulletin is a contribution to the study of general problems of unemployment—those that press for solution during each recurring period of industrial depression and are temporarily forgotten in the succeeding prosperous periods. The charts presented herewith picture the two kinds of fluctuations in employment, seasonal and cyclical. Seasonal fluctuations are those occasioned by climatic conditions and social habits. Cyclical fluctuations are caused by changes in business conditions.

The bulletin consists of two parts: One shows the trend of employment in representative factories of New York State for the period of two years and seven months from June, 1914, to December, 1916, inclusive; the other shows idleness in representative trade unions for the twelve and a half years from January, 1904, to June, 1916, inclusive. The charts for employment in representative factories show parts of one cycle only, as the depression curve of 1914–1915 had its beginning in 1913. The charts for idleness in representative trade unions show industrial cycles as well as seasonal fluctuations in those selected trades which are affected by such changes.

### **EMPLOYMENT IN FACTORIES\***

By June, 1914, the industries of New York State were feeling keenly the effects of the general industrial depression which had been developing in the United States for over a year. Evidences of this development are numerous. Unfilled orders of the United States Steel Corporation had decreased steadily from approximately 8,000,000 tons in January, 1913, to less than 4,000,000 tons in May, 1914. The value of exports exceeded the value of imports by \$138,000,000 in October, 1913; by April, 1914, the value of imports was \$12,000,000 greater than the value of exports. At the middle of October, 1913, car shortage on Ameri-

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\* This analysis of the volume of employment in factories is a summary of data published monthly in the Labor Market Bulletin of the New York State Industrial Commission for the months of September, 1915, to December, 1916, inclusive.

can railroads was 6,048; on May 31, 1914, there was a surplus of 241,802. Railroad earnings were 8.2 per cent less in May, 1914, than in May, 1913.

The year 1913 was the most successful year American farmers had ever experienced. But agricultural prosperity presented a striking contrast to conditions in the manufacturing and transportation industries. Hence the brunt of the depression of 1913-1914 was borne by industrial states like New York. For example, while the aggregate liability of all business failures in the United States was only 28 per cent greater in the first half of 1914 than in the first half of 1913, the corresponding increase for New York State was 63 per cent.

Hence the war in Europe did not cause a depression here; but it increased for a time the effects of unsettled industrial conditions which were already present. The recovery, stimulated at first by war orders, was gradually enhanced by increases in domestic business. The demand for labor in December, 1916, presented a marked contrast to the widespread unemployment prevalent during the latter part of 1914.

The charts on pages 13-24 show the trend of employment in the factories of New York State from June, 1914, to December, 1916, inclusive, as measured by the number of workers employed and the total amount of wages paid in representative factories and mills. As explained in the Appendix, the data for these charts was obtained from representative factories,\* which submitted once each month a transcript of the payroll records for the payroll period which included the 15th of the respective months.

The employees and wages curves in the chart on page 13 include *all industries combined*. Except for August,† 1914, the month in which the shock of the European war first showed its effect upon American manufacturing industry, the low point in the number of employees was reached in January, 1915. The recovery from then until August, 1915, was gradual. Beginning in September, 1915, the number of employees increased very rapidly until by April, 1916, it was 25 per cent higher than the

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\* For the number of factories, which reported each month, see page 44.

† August is a low month normally because of vacations and seasonal shut downs.

low mark of January, 1915. From April, 1916, until December, 1916, the number of employees increased but 4 per cent.

The curve of total wages also reached its lowest point in January, 1915, and rose gradually until August, 1915. Starting with the latter month, it mounted upward almost continuously from month to month. By December, 1916, it was 65 per cent higher than its low mark of January, 1915. The difference between the low and high marks of the wages curve is greater than the difference between the low and high marks of the employees curve for several reasons. During the period of depression in 1914, part time employment was common in many industries. Hence the total number of workers on the payroll was relatively greater than the aggregate amount of their wages. With the beginning of industrial recovery, full time for the workers already on the payroll was resumed before new workers were added. This caused total wages to increase faster than the number of employees. With the continual increase in industrial activity new men were added and full time was succeeded by overtime in some cases. Whenever overtime was practiced this tended to increase total wages faster than the number of employees. Finally, the relative scarcity of labor which accompanied the return to prosperity resulted in increases in wage rates. This increase in rates augmented total wages proportionately and helped to account for the more rapid rise in the curve of total wages.

The trend of the labor market in all industries combined will not, of course, be the same as the trend in groups of industries. Seasonal fluctuations, war orders, labor troubles and other influences affect the amount of employment more markedly in groups of industries than in all industries as a whole.

The chart on page 14 shows the trend of employment in the *stone, clay and glass products* group of industries. This group includes the manufacture of lime, cement and plaster; brick, tile and pottery; glass; and miscellaneous stone and mineral products. These are, for the most part, seasonal industries. Normally there are two slack seasons and two busy seasons in this group of industries. Summer shut-downs in the manufacture of glass cause a brief slack season in July and August while a longer winter slack season occurs in the manufacture of brick, tile, lime and cement.

The recovery from the depression of 1914 was delayed longer in this group of industries than in most other groups. The fall season of 1914 was but slightly better than the slack months of July and August. The succeeding slack season carried the level of both wages and employees, by February, 1915, over 30 per cent below the level of June, 1914. The summer recovery of 1915 was only partial as compared with June, 1914. It was not until the fall of 1915 that prosperity began to show effects in this group of industries. Since then the number of employees and the amount of total wages increased almost continuously. In fact it was only by a drop in total wages that a seasonal depression in the winter of 1915-1916 was noticeable since the number of employees changed but little during that time. By April, 1916, both total wages and employees had risen to a level above that for June, 1914. In December, 1916, total wages were 37 per cent greater than in June, 1914, and 98 per cent greater than in February, 1915, which was the lowest month shown in the chart.

The chart on page 15 shows the trend of employment in the *metals, machinery and conveyances* group. This group includes the following industries: pig iron and rolling mill products; structural and architectural iron work; sheet metal work and hardware; firearms, tools and cutlery; cooking, heating and ventilating apparatus; machinery; automobiles, carriages and parts; cars, locomotives and railway repair shops; boat and ship building; brass, copper and aluminum products; and instruments and appliances.

The metals-machinery group of industries was affected very favorably by war orders. The depression of 1914 continued throughout the year and part time employment was the rule. War orders began to be registered in the form of increases in employees and total wages as early as January, 1915. Since that time increases in both employees and total wages were rapid and practically continuous. The two conspicuous breaks in this upward movement—in October, 1915, and March, 1916—were caused by labor troubles. By December, 1916, the level of employees was 67 per cent higher while the level of total wages was 117 per cent higher than in October, 1914. The most marked

example of an industry favorably affected by war orders was the manufacture of firearms and tools. In this industry the number of employees increased 250 per cent while total wages increased 447 per cent from August, 1914, to December, 1916.

The immediate effect of the war upon the *wood manufactures* group as shown in the chart on page 16 was not so marked as in some other groups of industries. The normally regular slack periods occurred in July, 1914, and January and July, 1915. Beginning after the slack season of July, 1915, both wages and employees increased rapidly and, except for the regular slack season in January, 1916, continuously. The temporary decreases in May, 1916, were due to labor troubles. By December, 1916, the number of employees had increased 23 per cent and total wages 54 per cent over the low month of January, 1915. A striking contrast between the effect of a regularly recurring slack season in a period of depression and in a period of prosperity is shown in this chart. In January, 1915, the number of employees dropped 5 per cent and total wages dropped 7 per cent. The corresponding decreases for January, 1916, were only 1 per cent for employees and 4 per cent for wages.

The chart on page 17 shows the trend of employment in the *furs, leather and rubber goods* group, including the manufacture of leather; furs and fur goods; boots and shoes; rubber; and minor allied industries. The number of employees was not immediately affected by the war though total wages dropped temporarily because of the inability of some employers to obtain raw materials and because of labor troubles. The recovery was speedy and continuous, except for a temporary slack period in April, 1915, due largely to labor troubles and inventories. The month of September, 1916, also showed inactivity, due primarily to conditions obtaining in the leather and shoe industries. The increase in both employees and total wages began in August, 1915. By December, 1916, the number of employees was 32 per cent greater and the amount of total wages was 67 per cent greater than in June, 1914.

The trend of employment in the *chemicals, oils and paints* group is shown in the chart on page 18. This group includes the manufacture of drugs and chemicals: paints, dyes and colors:

were, respectively, 1 and 13 per cent higher than June, 1914. In fact the seasonal drop in the number of employees was scarcely noticeable in December, 1915 and 1916, while the drop in total wages was much smaller than in December, 1914. In April, 1916, the number of employees was 7 per cent greater and total wages were 17 per cent greater than the high levels of the corresponding spring rush season of 1915; in September, 1916, the fall high point, wages were 11 per cent and the number of employees 4 per cent higher than the same season of 1915, which reached its maximum in October. The sharp drop in both employees and total wages in May, 1916, was due to labor troubles. The net result of this industrial disturbance in May, 1916, so far as the trend of employment is concerned, was to prolong the summer dull season somewhat, to shift it forward, and probably to make it more acute than it would have been otherwise.

The chart on page 23 shows the trend of employment in the *food, liquors and tobacco* group, including bakeries; breweries; slaughtering, meat packing and dairy products; fruit and vegetable canneries; and the manufacture of flour, feed and other cereal products; miscellaneous groceries; confectionery and ice cream; and cigars and other tobacco products. This group has one busy and one dull season each year. The busy season begins in June and continues through October with sustained activity during the summer, when most of the other industrial groups are at a low ebb on account of vacations. The dull season is usually most marked in January and February. It is at this period that inventories are made in cigar factories, and breweries lay off each employee one day per week. The summer season in 1914 was unusually busy so that the corresponding season of 1915 seems dull in comparison. A striking demonstration of the existing shortage of labor is seen in the divergence between the wages' and employees' curves from January to December, 1916. While the number of employees increased but 10 per cent, total wages increased 24 per cent.

The chart on page 24 represents the course of employment in the *water, light and power* group of industries. From June, 1914, to October, 1915, both wages and employees kept a relatively even trend except for December, 1914, when overtime and increased



total wages resulted from seasonal demands of consumers at that period of the year. A similar increase in total wages is repeated in December, 1915, and December, 1916. Starting in October, 1915, the wages' curve begins to diverge, in an upward direction, from the employees' curve. This is undoubtedly attributable to increases in wage rates. During the entire period from June, 1914, to December, 1916, the number of employees was below the figure for June, 1914. The total payroll, however, increased 10 per cent during the same period.

### TRADE UNION IDLENESS

For several years\* the Bureau of Statistics and Information of the Department of Labor received idleness returns from representative trade unions in New York State. The percentages of idleness for each month from January, 1904, to June, 1916, are recorded in the charts on pages 25-36. In each chart the entire hatched surface for each month represents the total number of union members reported upon. The surface under the horizontal black line represents the proportion of the members who were idle on the date of the report.

The chart on page 25 shows idleness in all representative unions since January, 1904. During the prosperous years following the depression of 1903 there was relatively little idleness reported. The panic of 1907 increased idleness in the latter part of that year and in 1908. This was followed by a period of recovery in 1910 and again by a depression from 1913 to 1915. These idleness cycles as well as seasonal fluctuations are more noticeable in the charts for separate industries.

The chart on page 26 showing union idleness in the *metals and machinery* industries, is perhaps the best example of idleness cycles. First is shown the period of recovery from the depression of 1903; then the depression of 1908, followed by the recovery in 1909-10; next, the depression of 1911, followed by the recovery in 1912-13; finally the depression of 1914, followed by the recovery beginning in the latter part of 1915.

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\* The data and analysis of trade union idleness was published currently in the Quarterly Bulletins and Annual Reports of the Department of Labor from 1904 to 1912. Thereafter, Bulletins Nos. 58, 69 and 73 and the monthly Labor Market Bulletins from September, 1915, to June, 1916, contained summaries of the state of the labor market as evidenced by the amount of idleness among organized workmen.

Idleness in this group of industries is subject at present to three-year cycles. Seasonal influences, on the other hand, are apparently absent.

The chart on page 27 showing union idleness in the *clothing* trades, presents a striking contrast to the chart for metals and machinery. Previous to 1910 the returns from this trade were representative only of the most highly skilled workers in the clothing industry. Since that time all classes of labor are represented. Hence the contrast between the beginning and the end of the chart. The marked feature of the chart from 1910 to the present time is the extreme seasonal character of the work. Two seasons of idleness occur each year—the winter season being more severe and more prolonged. The seasonal idleness is so pronounced that it is hard to distinguish cycles of idleness. Such cycles occur, however, with periods of greatest idleness in 1908, 1910–11, and 1913–14, and periods of recovery intervening.

The chart on page 28 shows union idleness in the *printing and binding* trades. These trades present a striking example of regularization of employment through union regulations and trade agreements. Since 1908 there has been a minimum of union idleness in these trades, which has been affected but little either by seasonal changes or industrial cycles. Of course the nature of the printing industry has much to do with this regularization of employment.

The chart on page 29 shows union idleness in the *woodworking and furniture manufacturing* industries. During the period covered in this chart there are four idleness cycles; the depression of 1903 continued through 1904 and was followed by the recovery in 1905–06; that of 1908 was followed by the recovery of 1909–10; a somewhat less pronounced period of idleness in 1911 was followed by a brief recovery in the latter part of 1912; and the more prolonged period of idleness in 1914–15 was followed by a period of recovery extending from September, 1915, to April, 1916. These industries have a dull season in the winter and a busy season in the summer.

The chart on page 30 shows union idleness in the trades engaged in the manufacture of *food and liquors*. These trades are not greatly affected by general industrial cycles of depression and

recovery and apparently not at all by seasonal changes. The three peaks of idleness—October, 1904, April, 1906, and May to July, 1910—were periods of labor troubles.

The chart on page 31 shows union idleness in the *tobacco* industry. The cycles of idleness are quite marked here, with prosperous years following the depression of 1903; then the depression of 1908–09, followed by the temporary recovery in 1910, a less prominent depression in 1911, and another recovery in 1912–13; and finally the depression of 1914–15, followed by the period of recovery from May, 1915, to June, 1916. The occasional peaks of unemployment in December are explained by the fact that in this industry it is customary for an inventory to be taken in December. In some years the date upon which idleness was reported fell within this inventory period! The idleness peak in June, 1914, is due to inventory in some of the factories at the time the reports were made.

The chart on page 32 shows idleness of union members employed in *hotels, restaurants and retail trade*. Although the idleness cycles are noticeable in this chart, there are not the wide fluctuations in employment which are found in some other industries. Likewise, seasonal fluctuations play little part in this chart except that in general there is less idleness in the summer than in the winter.

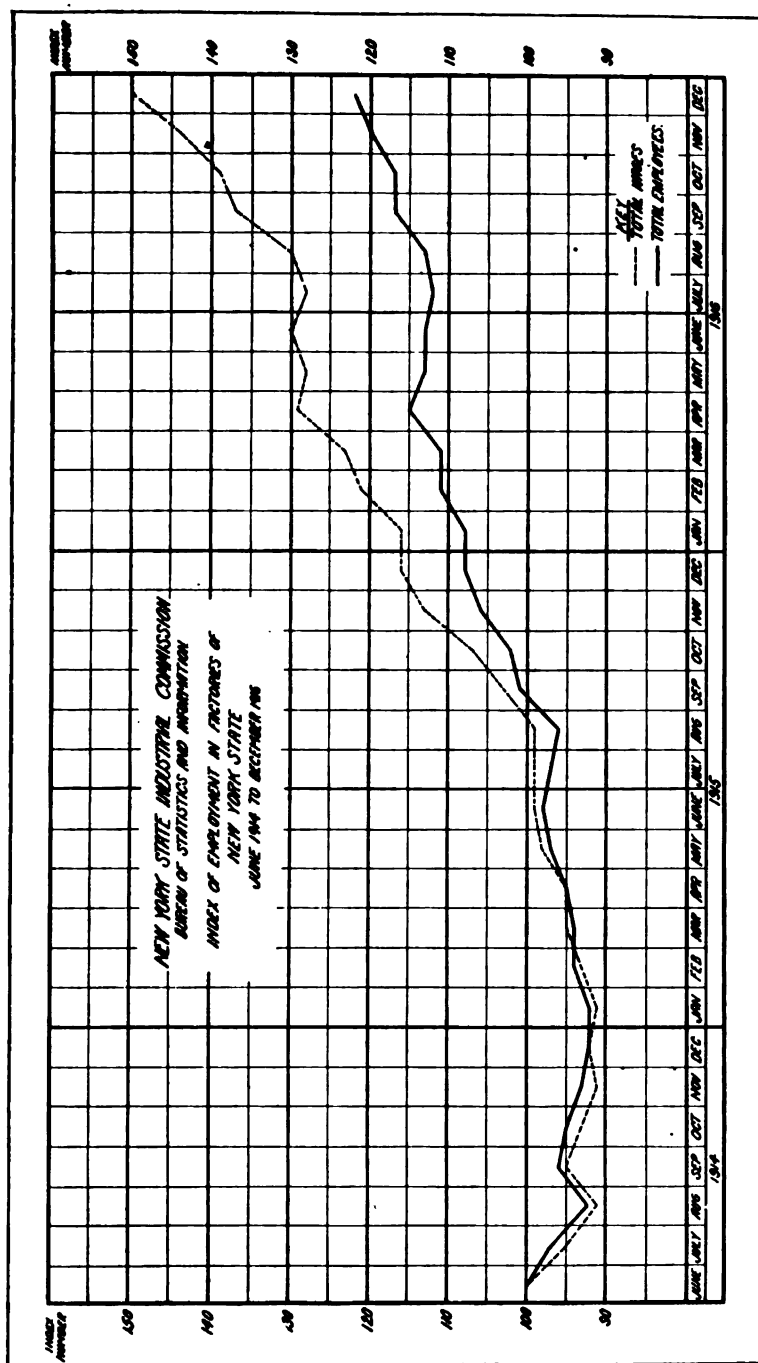
The chart on page 33 shows union idleness in the *building* trades including stone working, building and paving trades, and building and street labor. Here are found marked fluctuations both by seasons and by cycles. Each year has a dull winter season beginning in December and a busy season beginning usually in April or May. In the building trades the recovery from depressions is somewhat slower than in manufacturing industries. Thus the recovery from the depression of 1903 was most marked in 1905. The recovery from the depression of 1914–15 is apparent in the chart only by a contrast between idleness in the dull season of those years and that in the dull season of 1916.

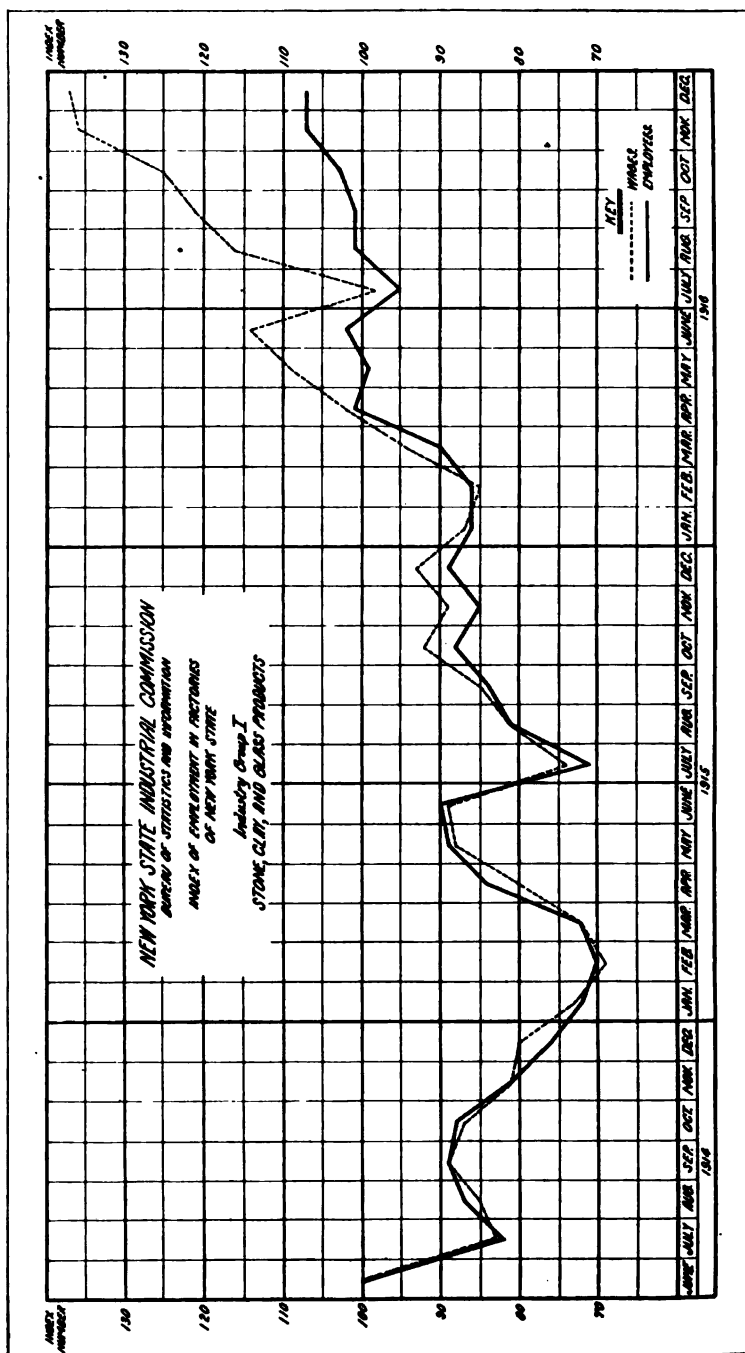
The chart on page 34 shows union idleness in the *transportation* industries, including railway construction and repair work, navigation, teaming and cab driving, freight handling and telegraphs. This chart should be considered in two sections. Previous to

January, 1912, this group included representatives of the lake seamen. The seamen are idle at least four months during the winter, beginning in December. Hence up to 1912, each year shown in the chart had a dull winter season. Since December, 1911, idleness among lake seamen has not been reported so that the winter idleness season has not been so marked. The idleness cycles are quite prominent in this chart. The secondary idleness peak in 1911 is noticeable as a prolongation of the dull season.

The chart on page 35 shows idleness among organized *theatrical employees and musicians*, especially members of orchestras in theatres. This chart shows extreme seasonal fluctuations, with a great amount of idleness during the three or four late spring and summer months when the theatres are closed and none at all or very little during the theatrical season from fall to spring. The idleness cycles are noticeable chiefly in the alternate prolongation and shortening of the dull season. In 1908 some members were idle each month of the year. In 1911 the greater portion of the summer idleness extended over four months while in 1912 it covered only three months and in 1913 only two. Again in 1914, summer idleness covered four months and in 1915, five months.

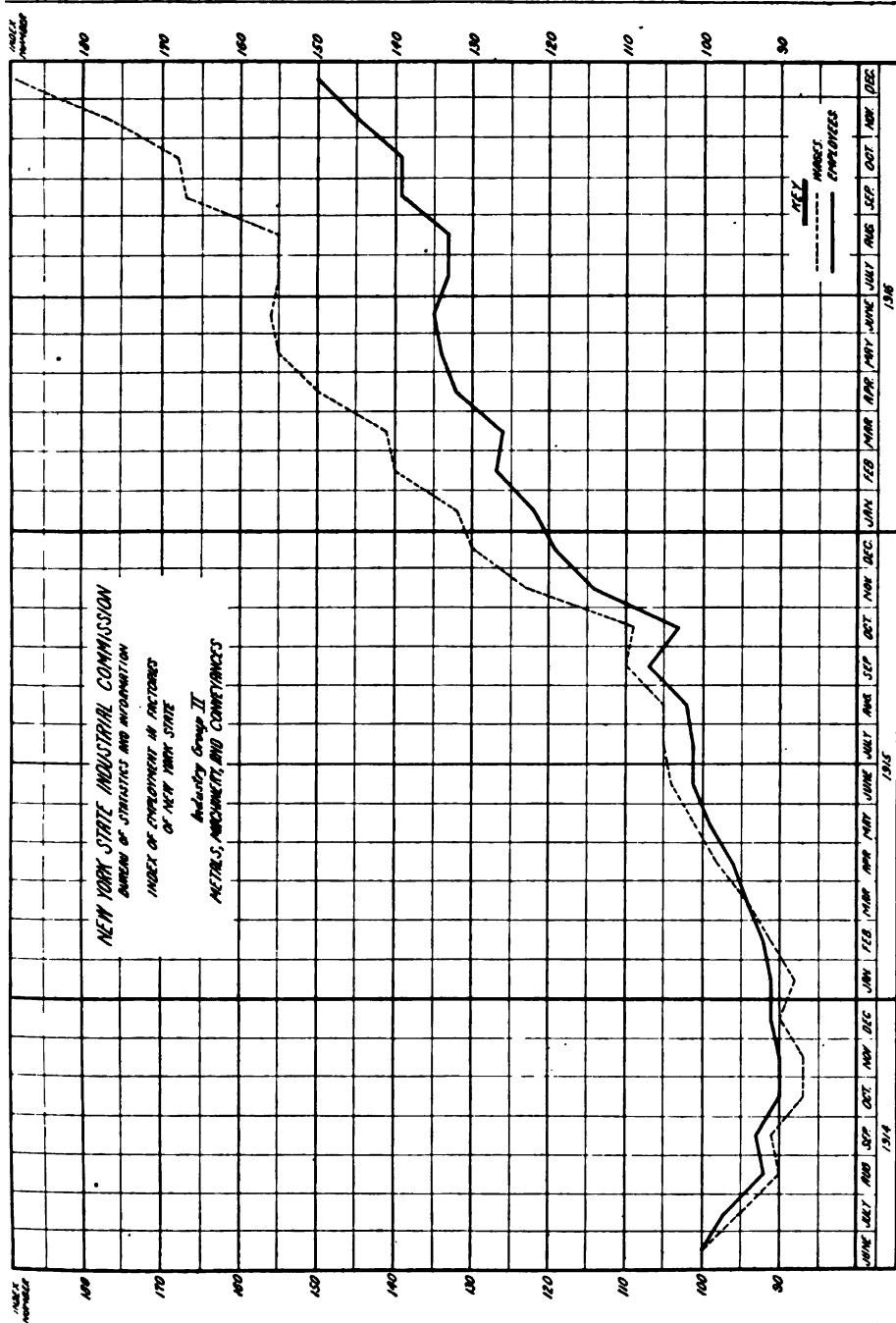
The chart on page 36 shows union idleness among *stationary engine tenders* in breweries, hotels, public buildings and factories. There is practically no idleness in this trade even when industries in general are feeling the effects of an industrial depression. At no time during the twelve and a half years covered in the chart were as many as 3 per cent of the members reported idle. Neither seasonal fluctuations nor idleness cycles are prominent in this trade.

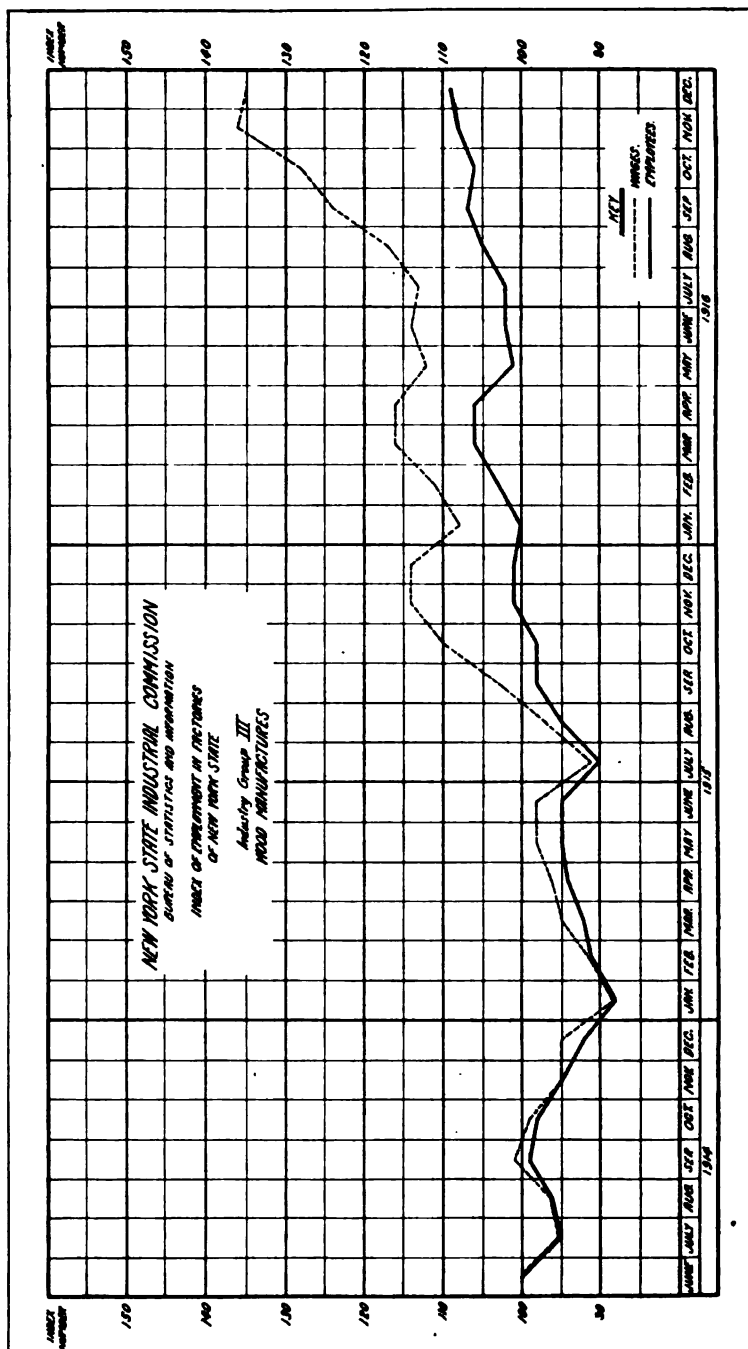




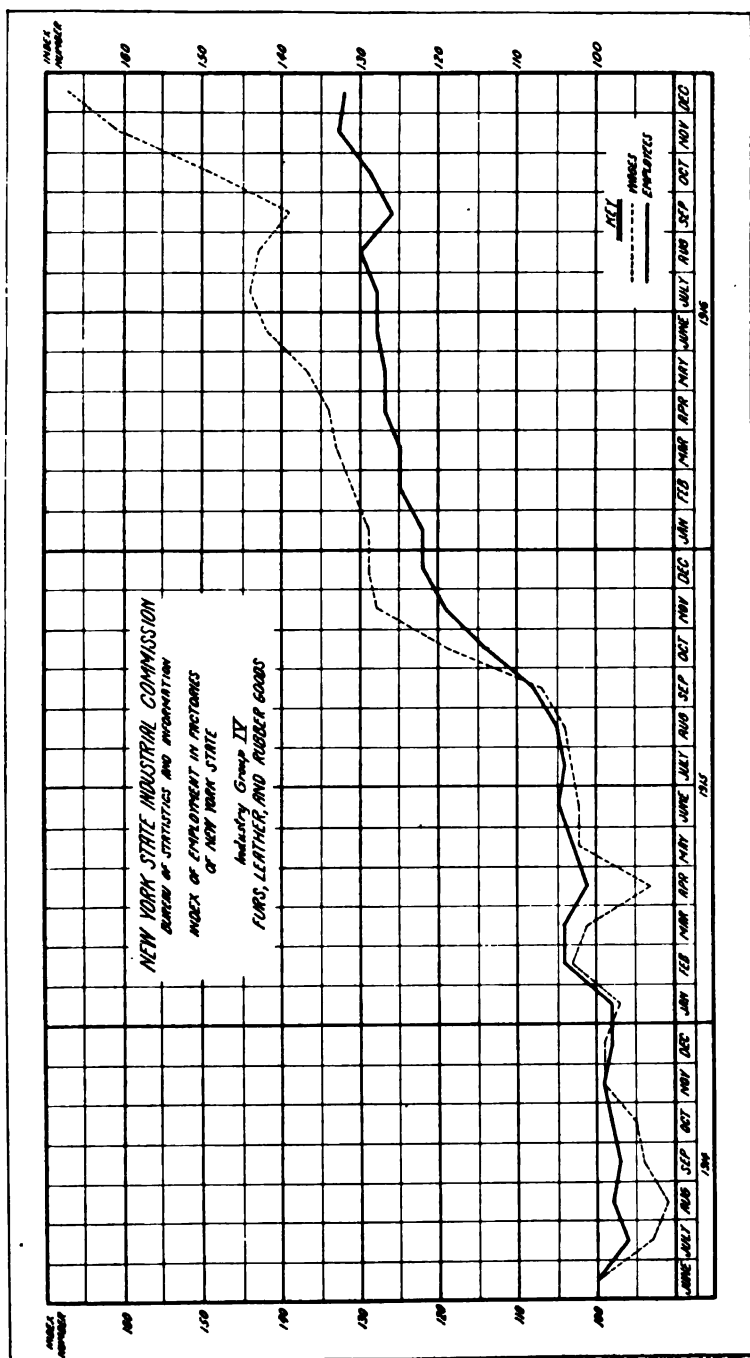
# COURSE OF EMPLOYMENT IN NEW YORK STATE

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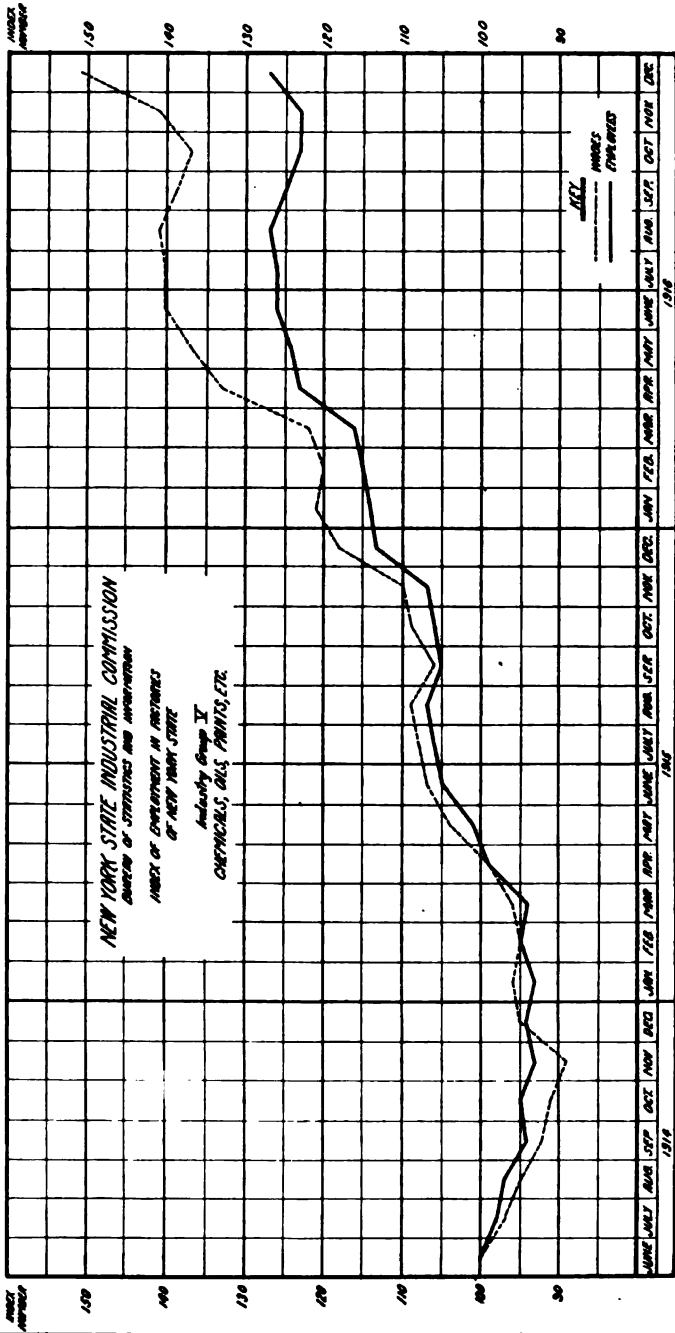


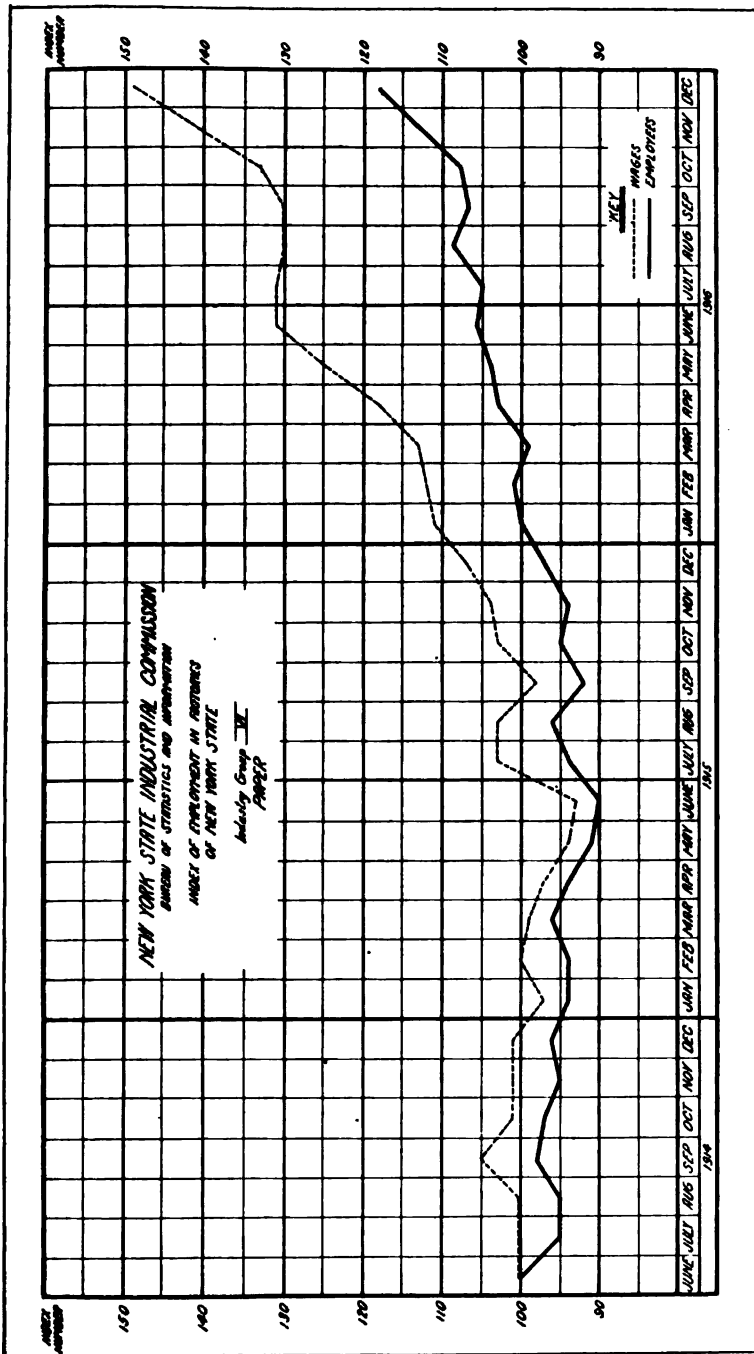


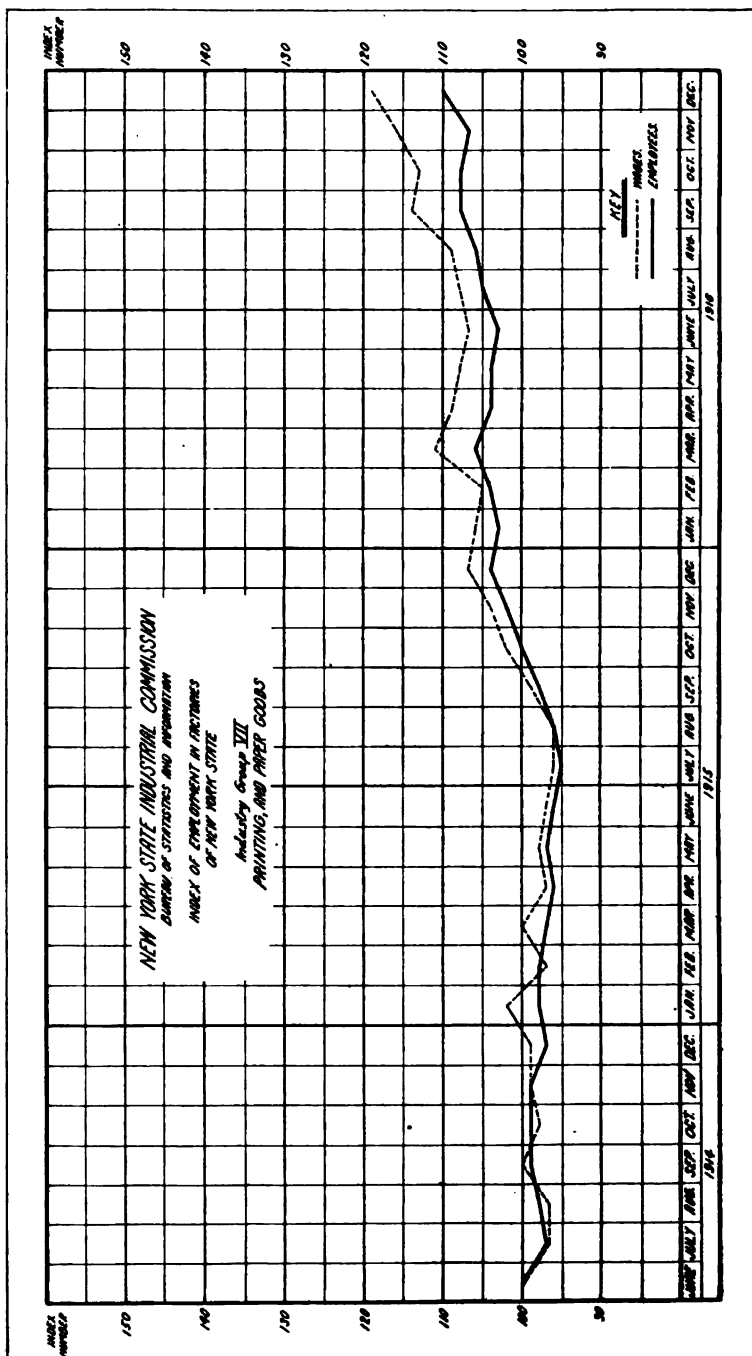


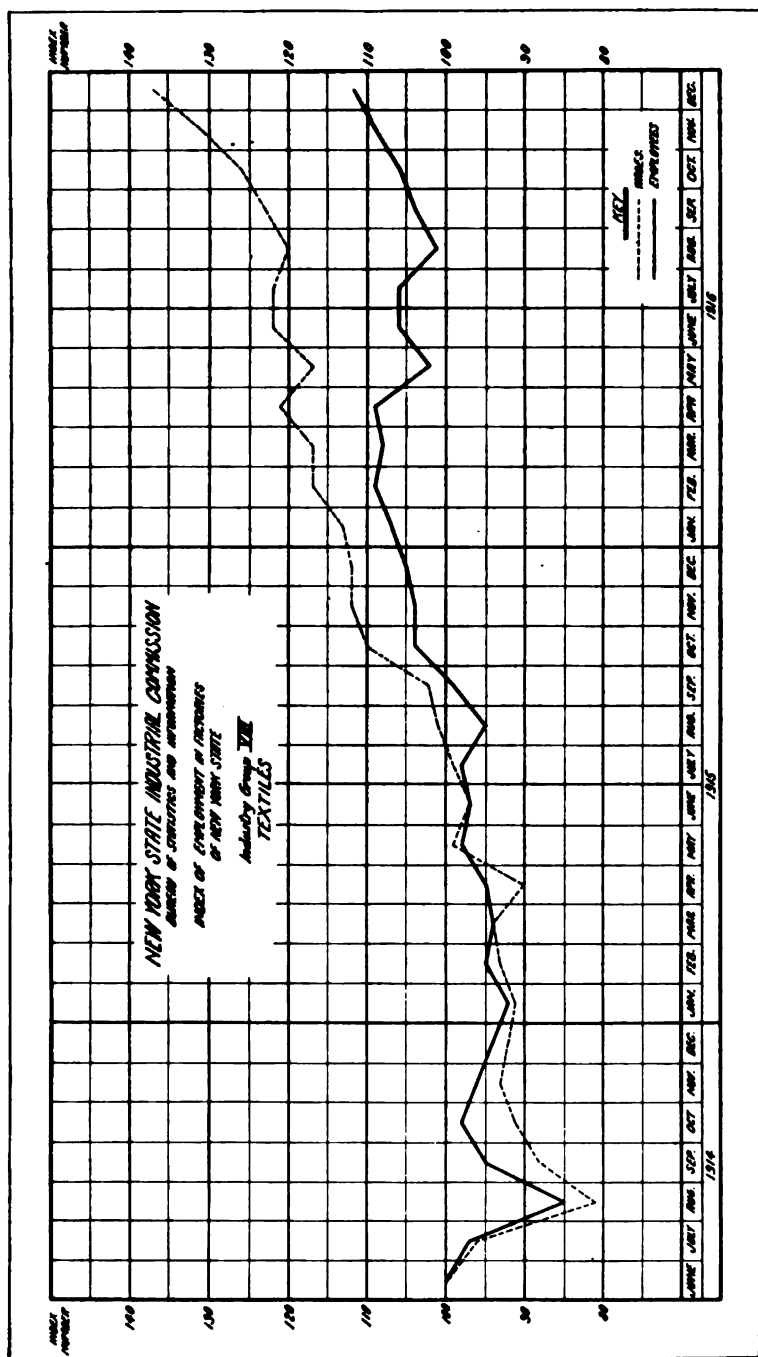


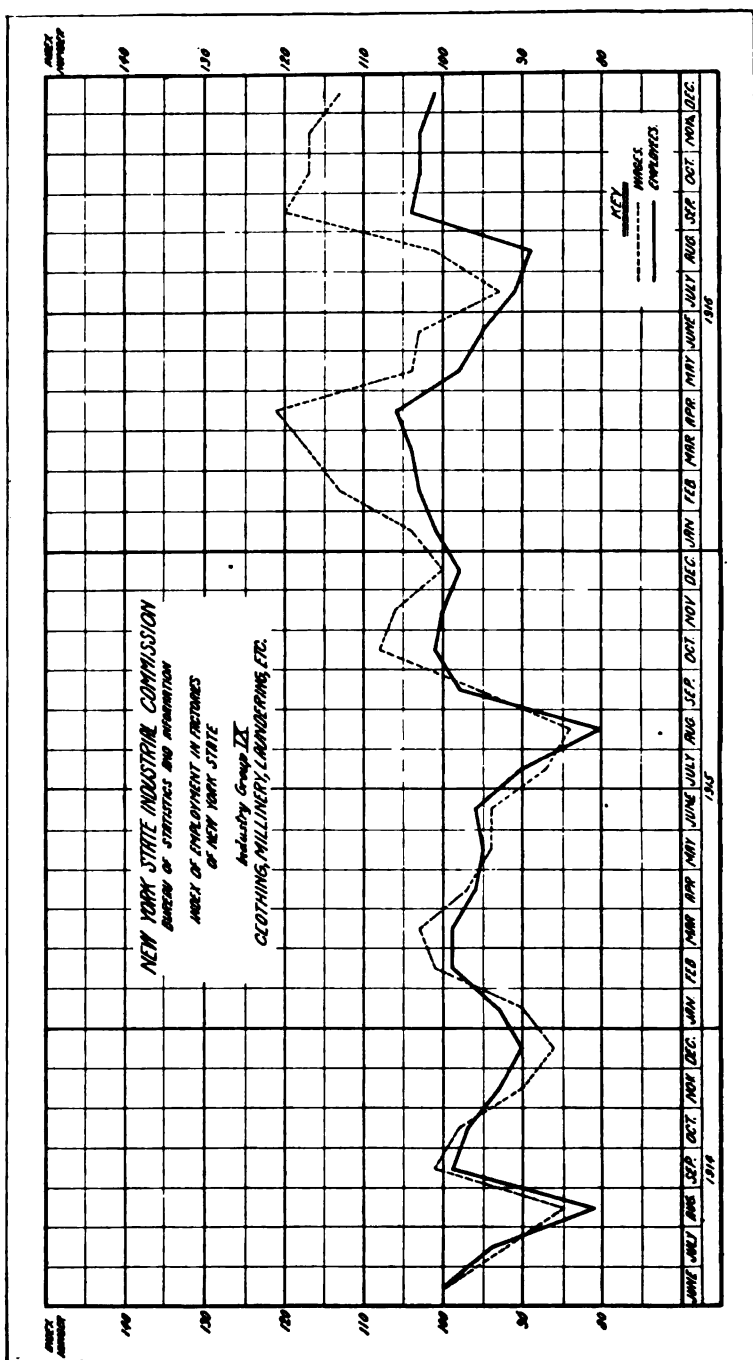
## NEW YORK STATE INDUSTRIAL COMMISSION

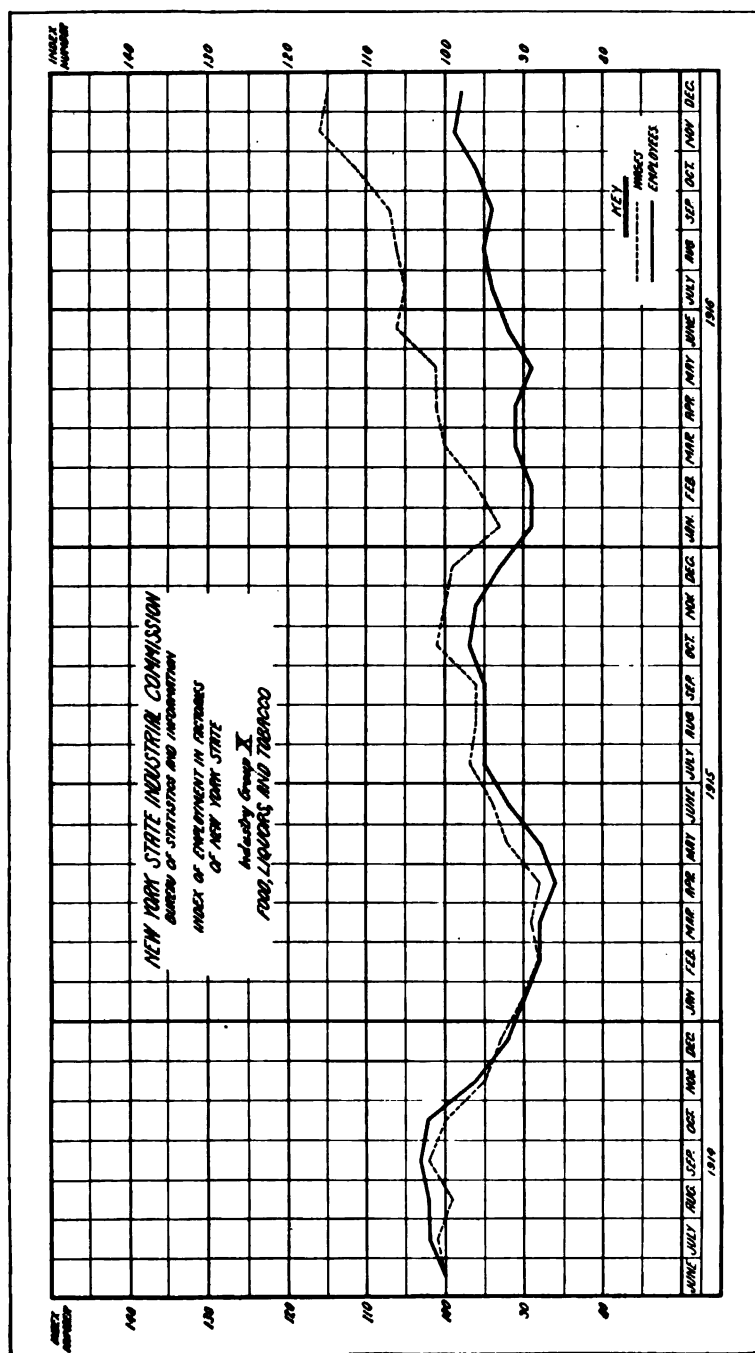


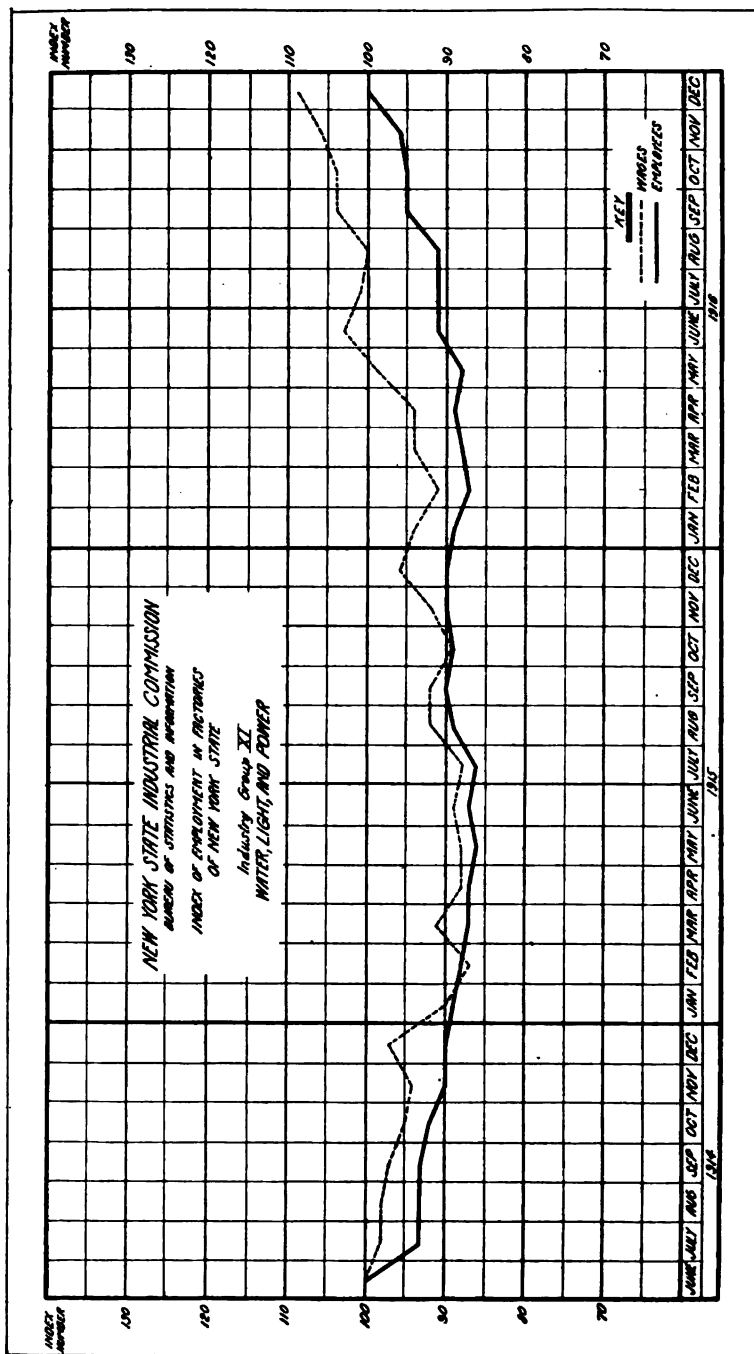




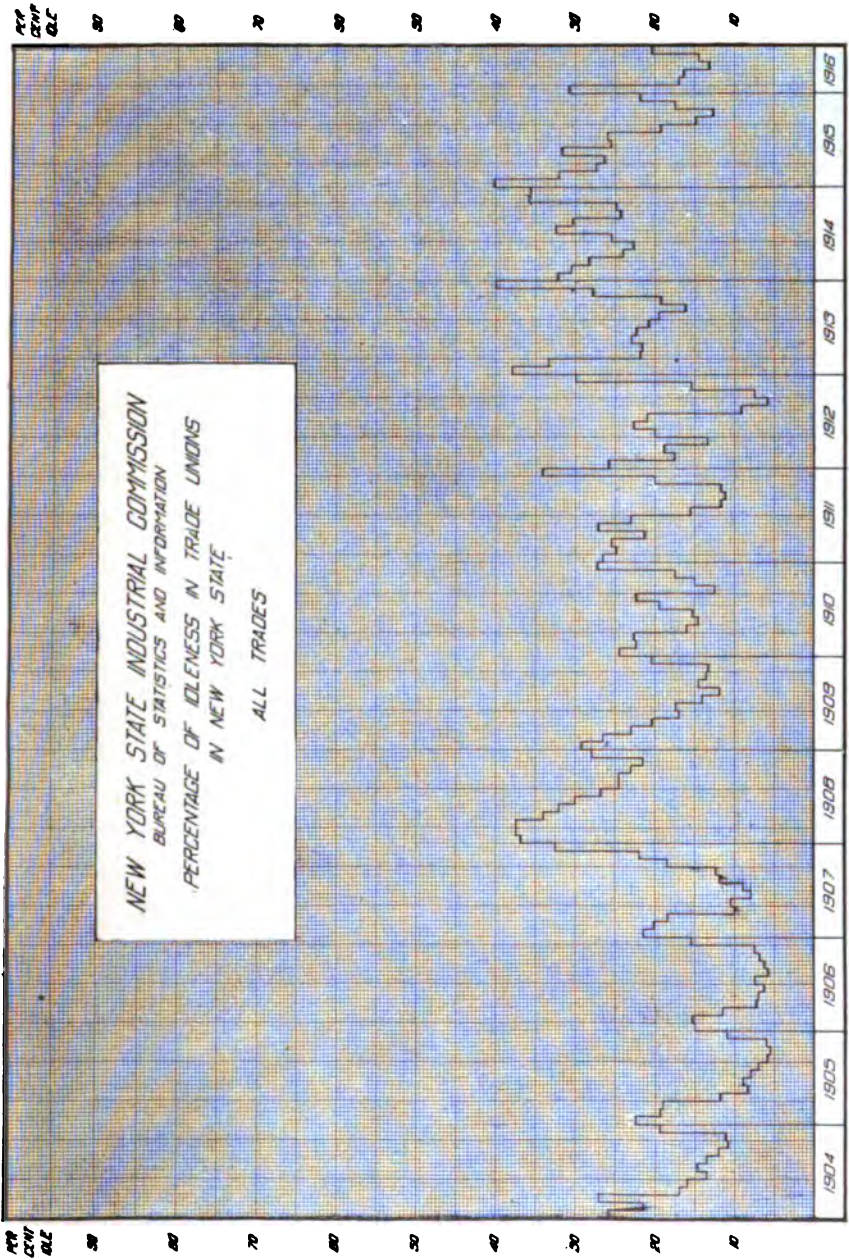


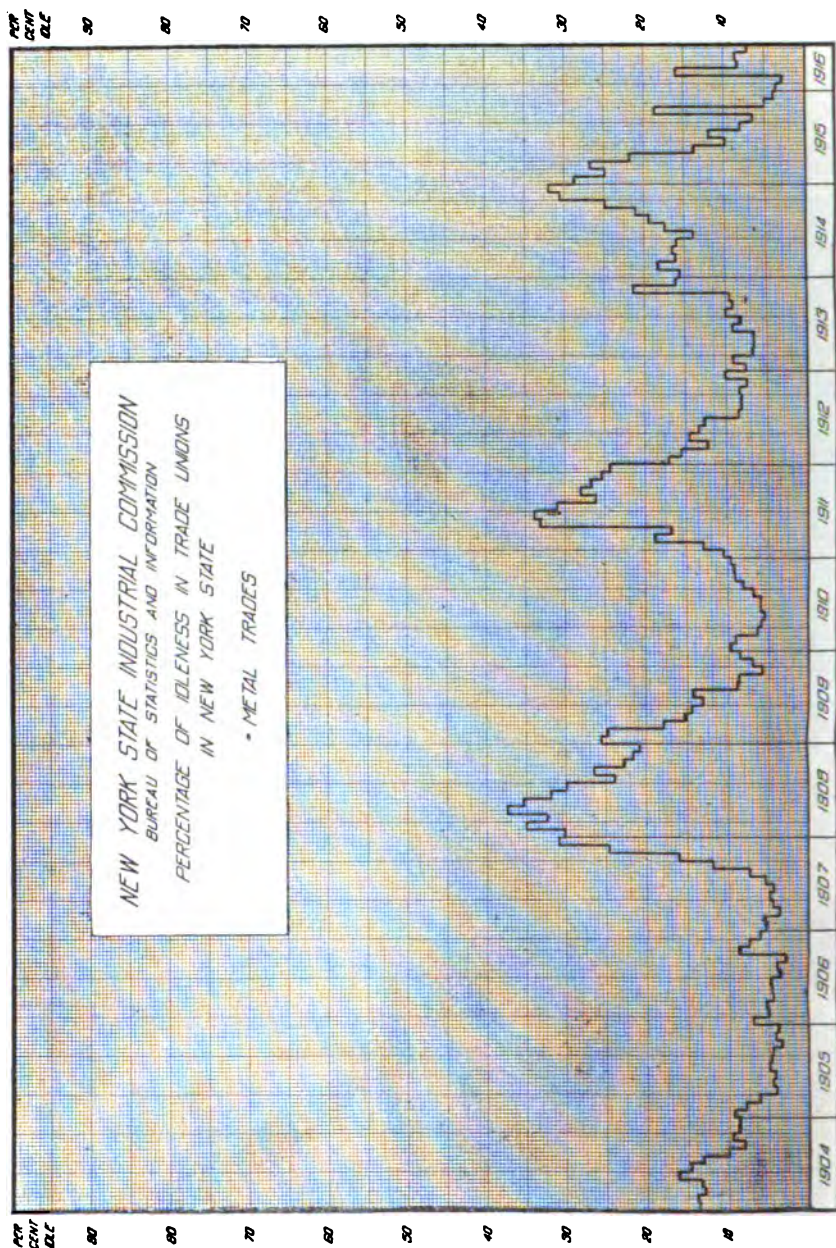




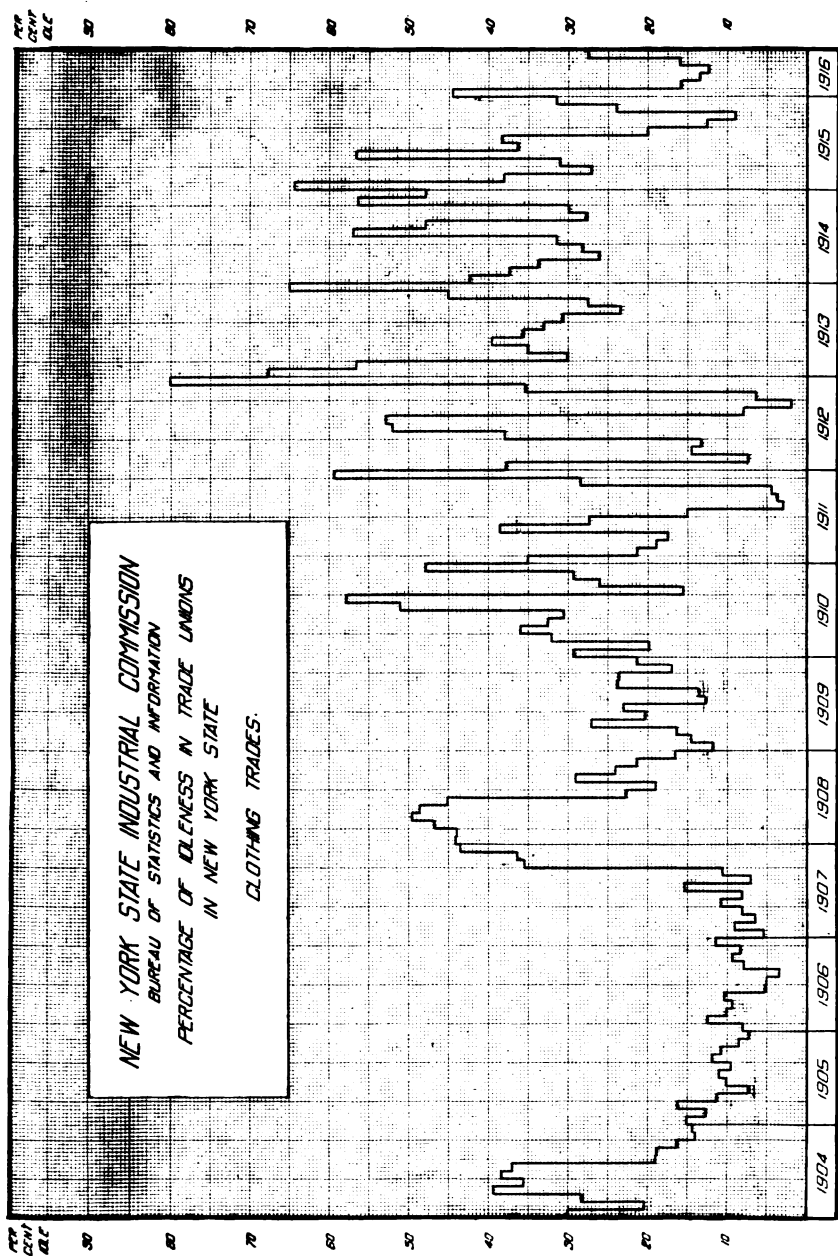


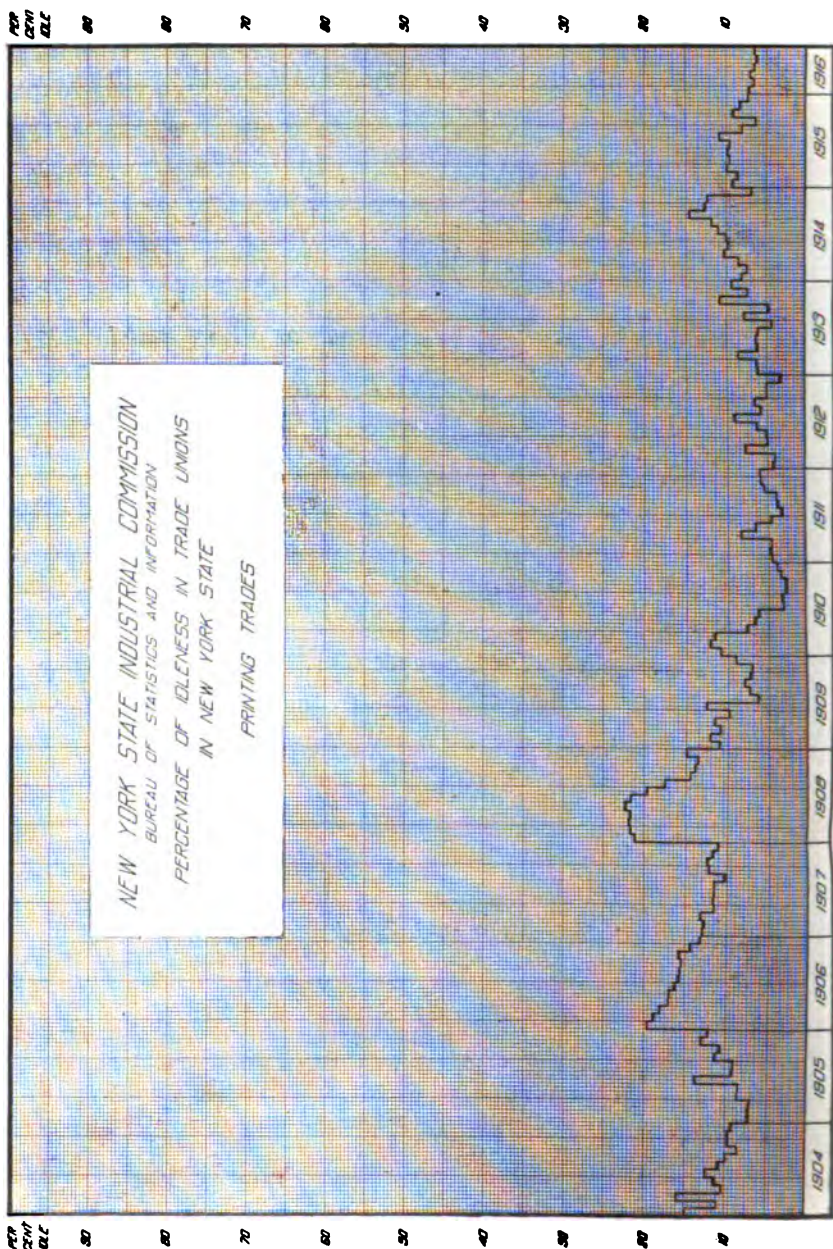




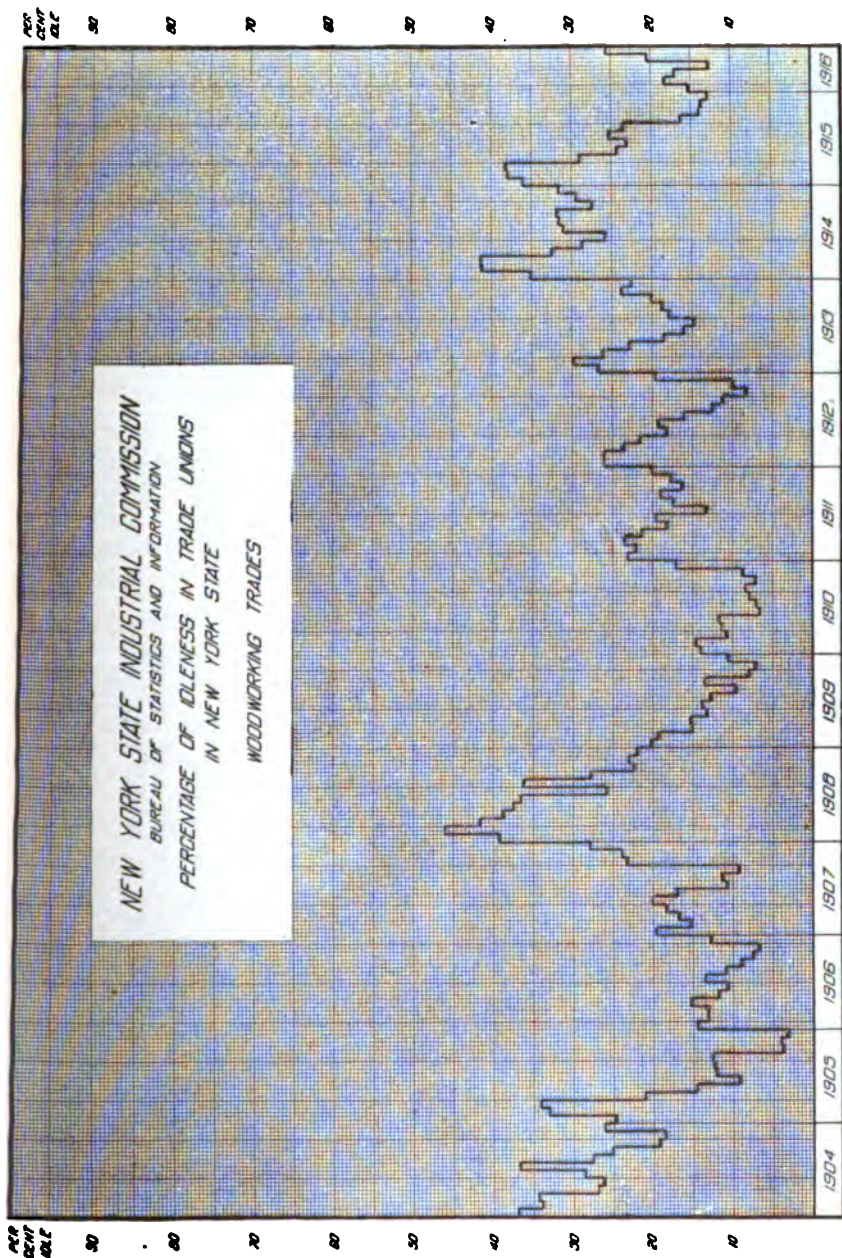


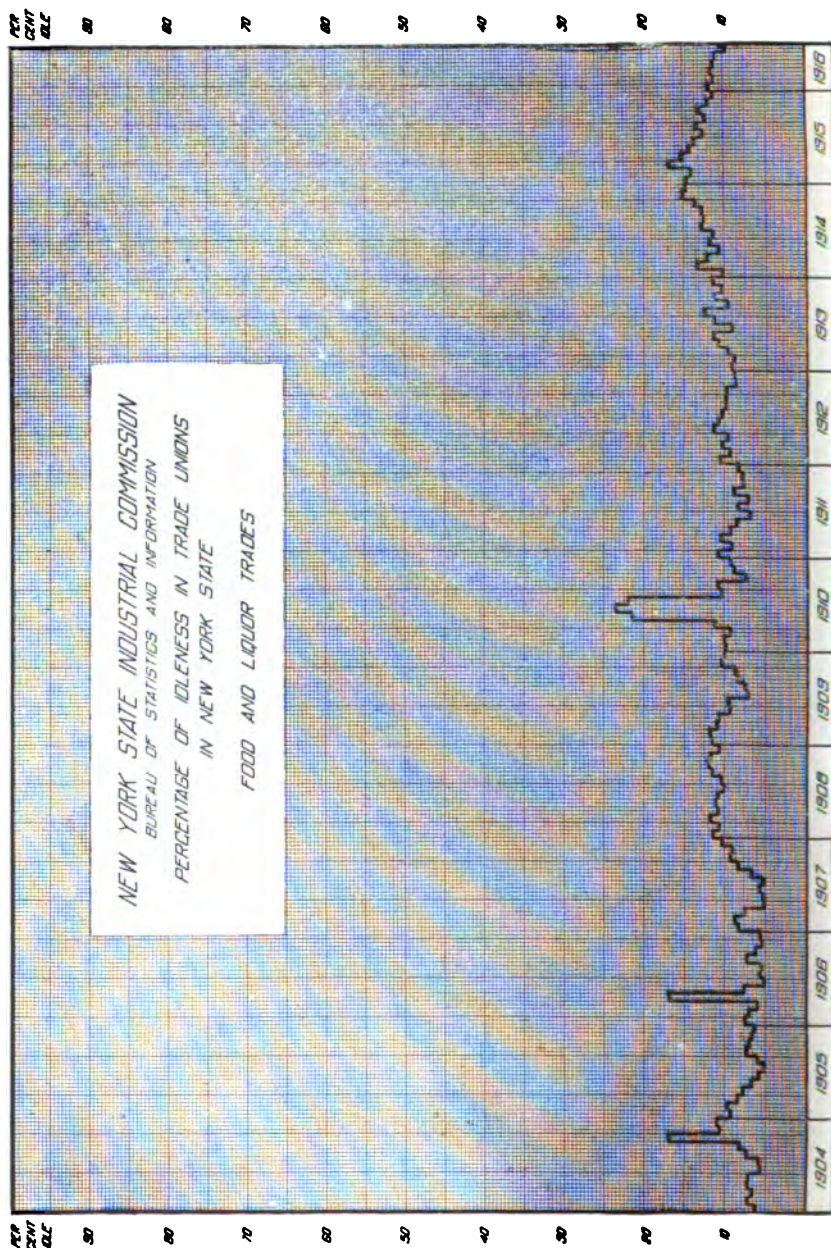




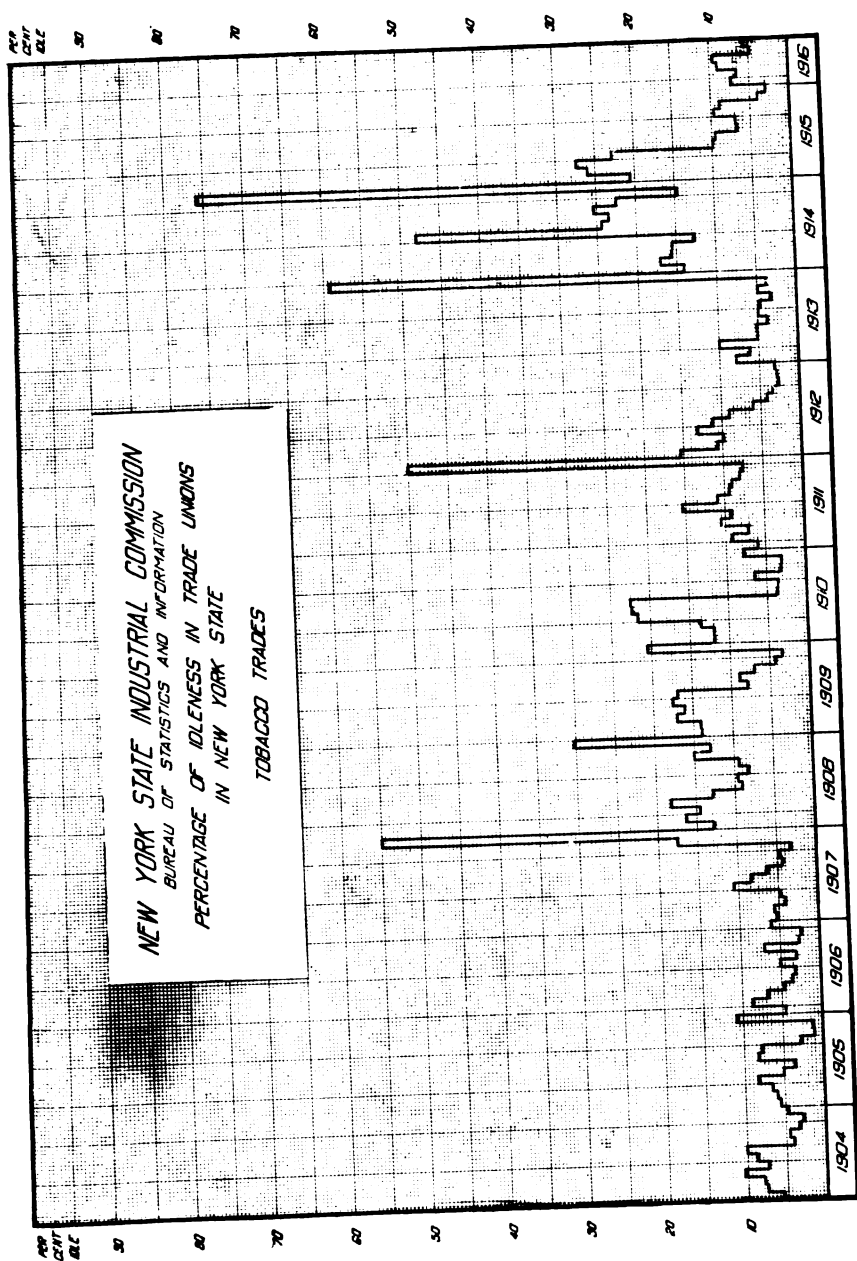


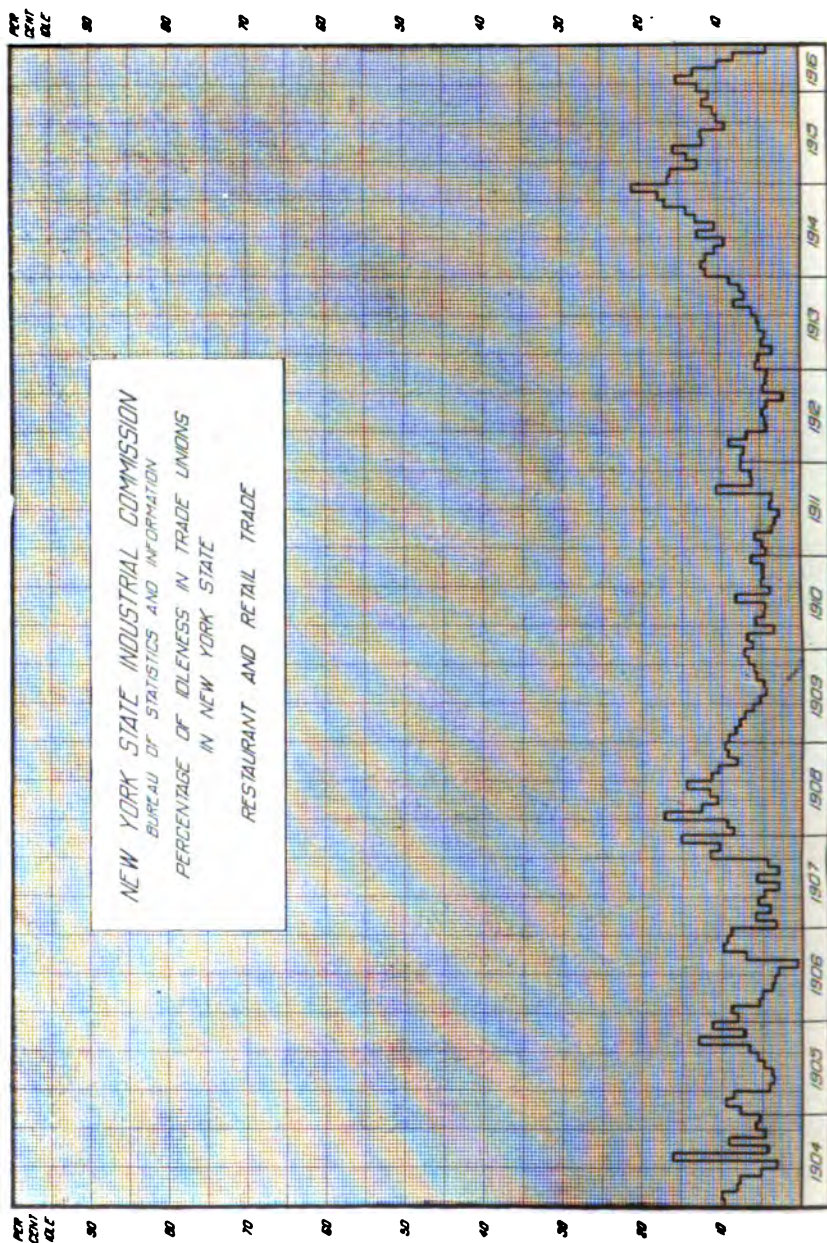




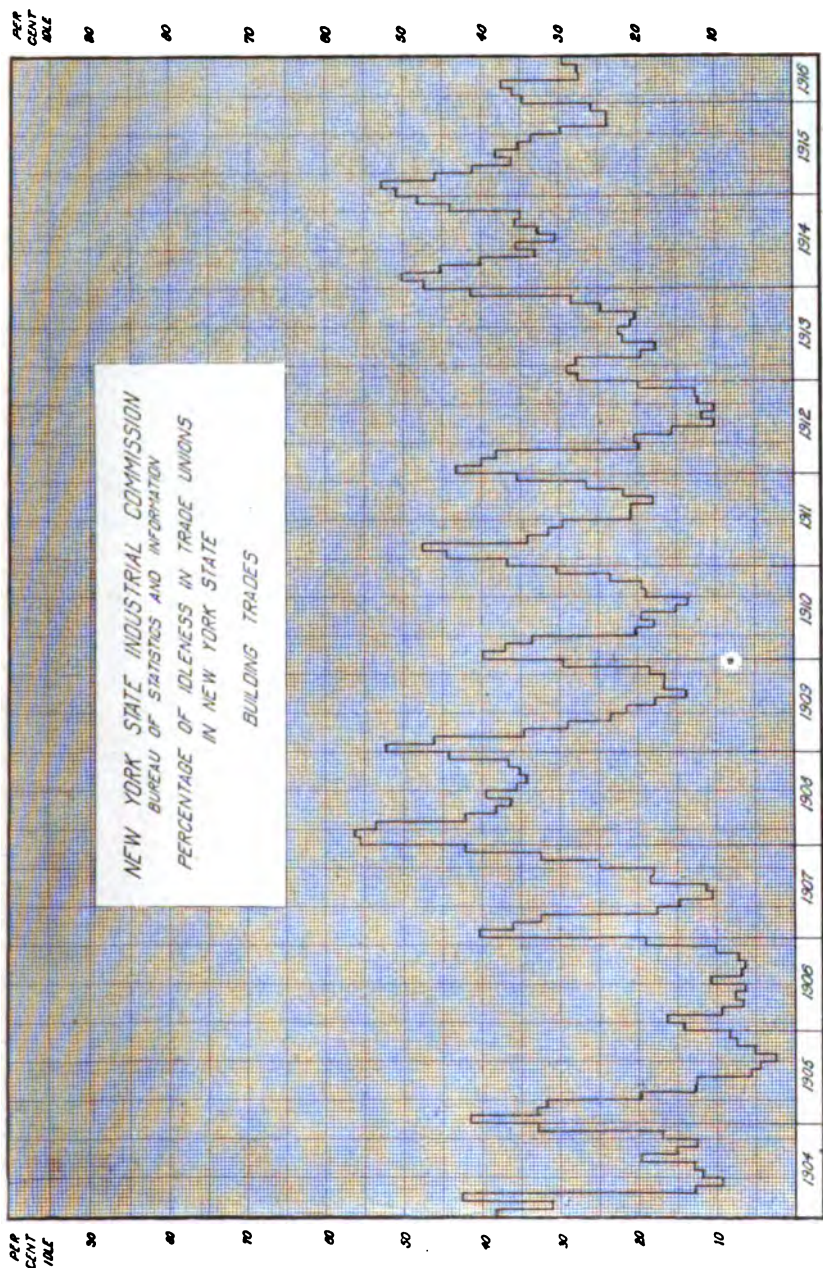


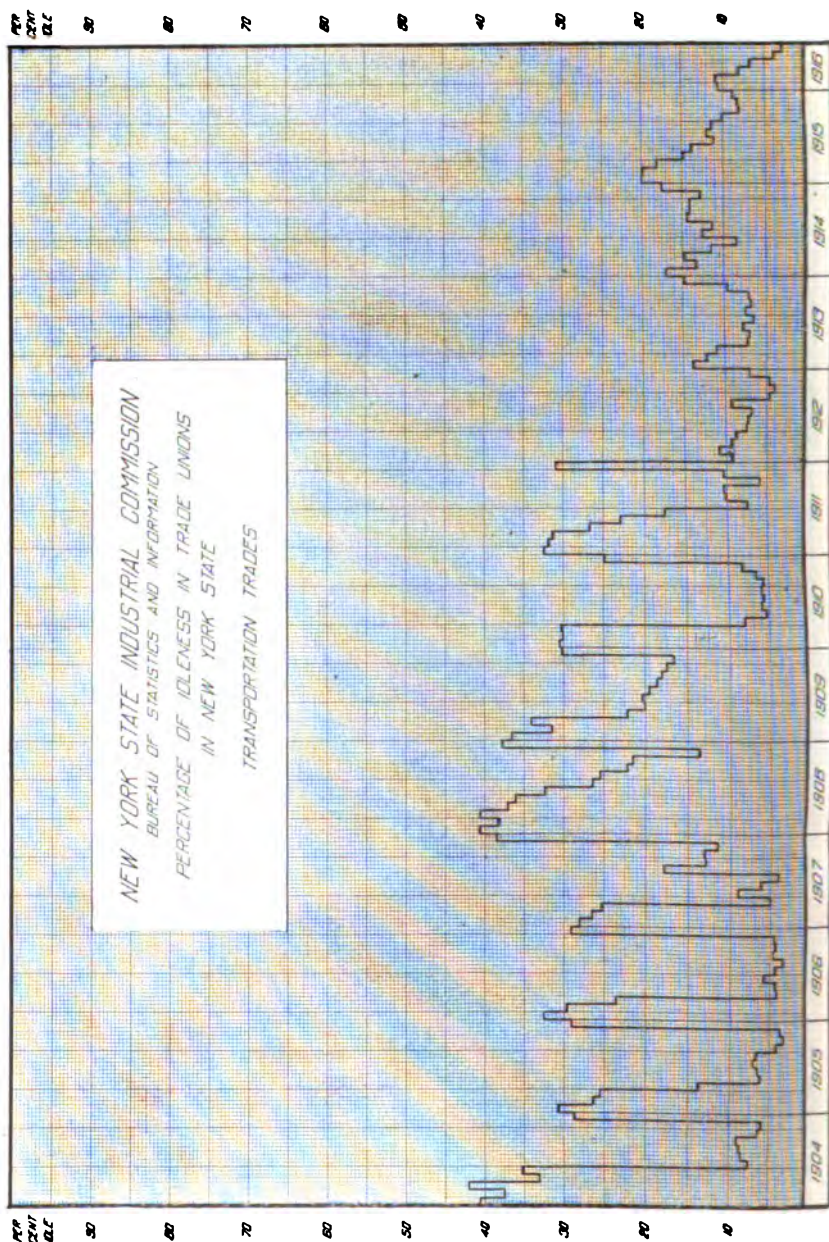


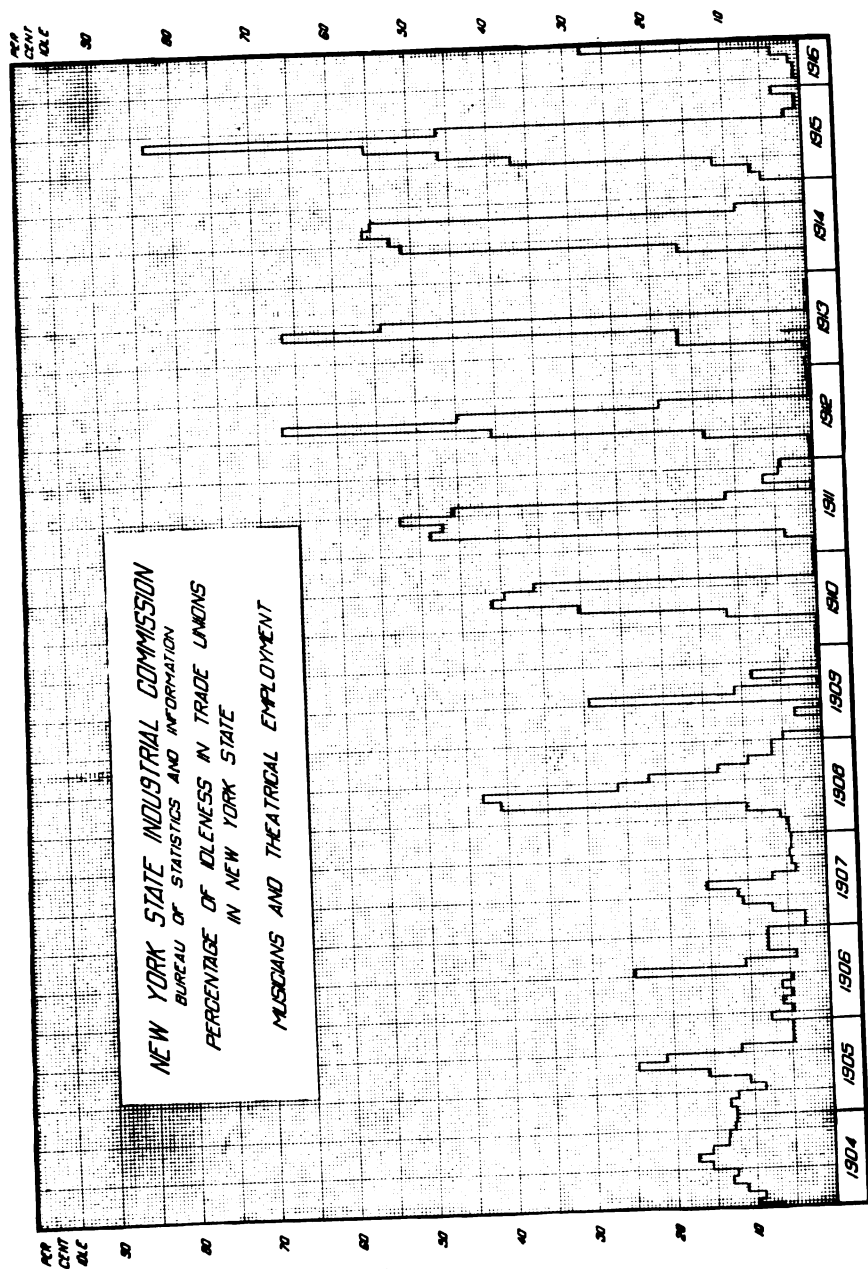




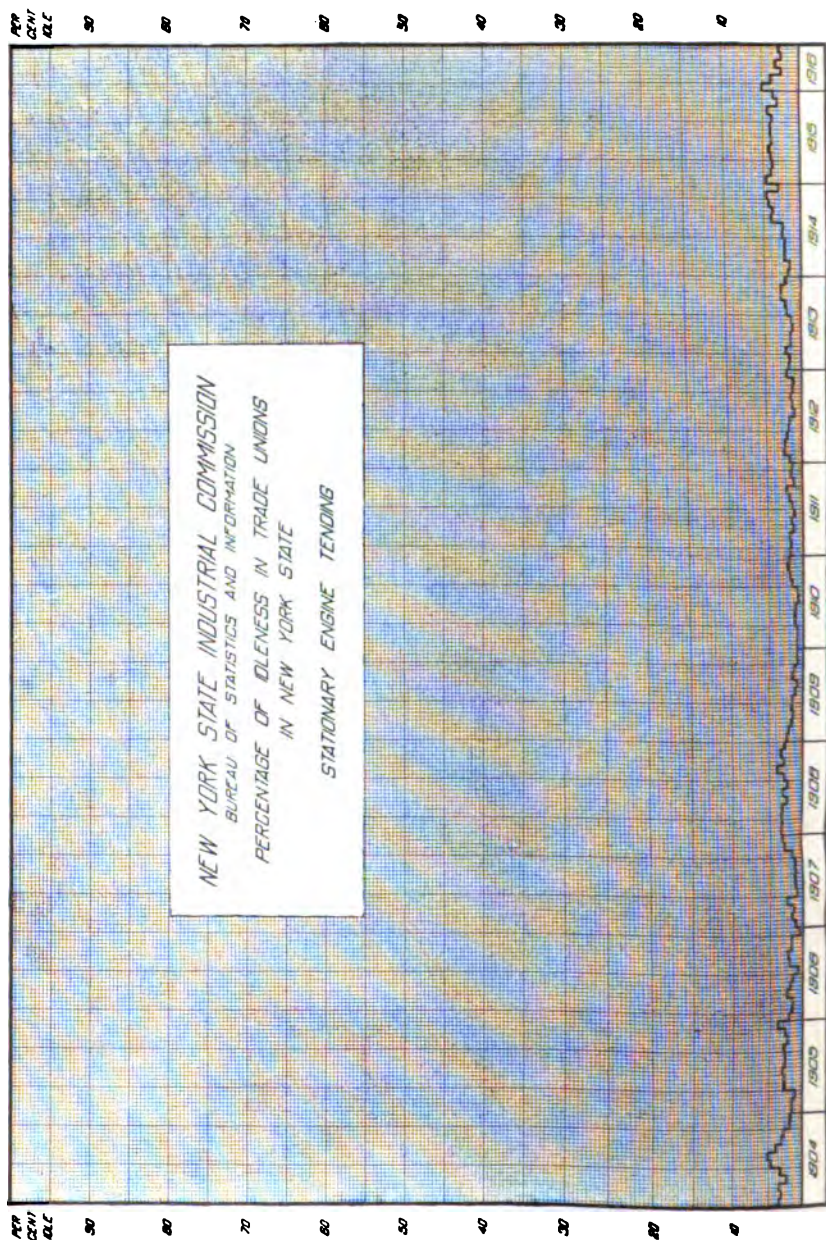












## Appendix

### METHOD OF OBTAINING AND COMPUTING DATA

#### Pay-Roll Reports From Factories

The charts and index numbers, in this Bulletin, on the number of employees and total wages paid in *representative* factories of New York State are based on reports made monthly by such factory owners to the Bureau of Statistics and Information of the New York State Industrial Commission. The schedule for the report calls for pay-roll information as to the number of office and shop employees, respectively, and the amount of wages paid for the firm's pay-roll period which included the 15th of the month. This pay-roll period is usually for one week. The correspondents furnishing reports are requested to note on the schedules "if there have been special circumstances, such as changes in wage rates, processes of manufacture or line of goods made, or such as departments or branch factories opened or closed, etc., affecting the significance of the figures reported." These reports were first received in June, 1915, and data were requested on the same schedule for the corresponding month of 1914. Starting with June, 1916, the firms were requested to submit data for the current month only, inasmuch as the reports for 1915 were then on file with the Bureau of Statistics and Information.

The first tentative list of representative factories comprised 1,929 firms. In preparing the list, regard was had for the geographical distribution of the factory workers throughout the state, as well as the industrial composition of each locality. If a city had 10 per cent of the state's factory workers, approximately a like percentage of the representative list was chosen from that city. Similarly, a center for the manufacture of textiles, like Cohoes, was given due representation in the industrial group which comprises the manufacture of textiles. After the returns for June, July and August, 1915, were received and edited, the list was revised and reduced.

Starting with September, 1915, the list of representative firms varied each month due to the failure of some firms to report in time for inclusion in the tabulation. As is explained later, the amount of variation was small and did not affect the comparability of the returns from month to month for the reason that comparisons were made through the medium of ratios to the June, 1914, totals for the firms which were included in any given month.

In computing the representation which each of the eleven groups of industries should have, after the first three months' returns were received, recourse was had to the census of manufacturing which appeared in the 1913 Industrial Directory of the New York State Department of Labor. The 1913 data of the *representative* list of firms were tabulated by industrial groups and these group totals of the *representative* list were compared with the 1913 group totals for the *entire* state. A similar comparison was made in December, 1916, and the following table shows the respective percentages:

PERCENTAGE OF EMPLOYEES IN EACH INDUSTRIAL GROUP IN REPRESENTATIVE LIST, IN RELATION TO THE TOTAL NUMBER OF EMPLOYEES IN THE STATE, ACCORDING TO FIGURES FOR 1913

INDUSTRY GROUPS	PERCENTAGE* OF EACH REPRESENTATIVE GROUP TOTAL TO THE CORRESPONDING GROUP TOTAL FOR ENTIRE STATE, IN 1913, FOR FIRMS REPORTING IN —	
	June, 1914	December, 1916
I. Stone, clay and glass products.....	30	39
II. Metals, machinery and conveyances.....	46	52
III. Wood manufactures.....	26	33
IV. Furs, leather and rubber goods.....	34	42
V. Chemicals, oils, paints, etc.....	44	54
VI. Paper.....	42	46
VII. Printing and paper goods.....	35	36
VIII. Textiles.....	49	54
IX. Clothing, millinery, laundering, etc.....	16	22
X. Food, liquors and tobacco.....	30	34
XI. Water, light and power.....	22	26
All Industries Combined.....	33	38

Groups II, V, VI and VIII which include Metals and Machinery, Chemicals, Paper, and Textiles have a higher percentage than the other groups for the reason that large sized plants predominate in these industries and a small number of factories will produce an extremely high quota of employees. On the other hand Group IX, Clothing, has a meager representation, for in this industry the small sized factory is the rule and any attempt to increase the number of employees would necessitate the addition of a very large number of plants. It has not been found feasible to increase the representation of the clothing industry. From June, 1914, to December, 1916, the number of employees in the entire representative list, shown by the 1913 figures, changed (increased) but 5 per cent. This demonstrates that the substitution each month of some different firms did not disturb comparability to any great extent.

The weight of each industry group in the total for all, for number of employees as reported in 1913,† in June, 1914, and in December, 1916, respectively, is shown in the following table:

\* These percentages are computed from the 1913 figures (number of employees) of those firms which were utilized in June, 1914, and December, 1916, respectively.

† The 1913 figures for each firm were generally annual averages.

## WEIGHT OF EACH INDUSTRY IN TOTAL

(Per cent of each industry of total for all, for firms reporting in the respective periods, using 1913 figures)

INDUSTRY GROUPS	Entire State, 1913	REPRESENTATIVE LIST	
		June, 1914	December, 1916
I. Stone, clay and glass products.....	2.6	2.4	2.7
II. Metals, machinery and conveyances.....	24.4	34.0	32.9
III. Wood manufactures.....	6.4	5.2	5.5
IV. Furs, leather and rubber goods.....	6.3	6.5	7.0
V. Chemicals, oils, paints, etc.....	3.4	4.6	4.8
VI. Paper.....	1.2	1.6	1.5
VII. Printing and paper goods.....	8.4	9.0	7.8
VIII. Textiles.....	8.8	13.2	12.5
IX. Clothing, millinery, laundering, etc.....	27.7	13.9	15.9
X. Food, liquors and tobacco.....	9.9	9.0	8.8
XI. Water, light and power.....	0.9	0.6	0.6
Total.....	100.0	100.0	100.0

This table also shows that Groups II and VIII, Metals and Textiles, are somewhat overweight, while Group IX, Clothing, is underweight. In the representative list, the proportion for metals, compared to the total for that entire list, is approximately 10 per cent more than the corresponding figure for all manufacturing firms in the state. Similarly, the proportion for textiles in the representative list is about 5 per cent higher than the proportion for this group in the state as a whole. Group IX, Clothing, in the representative list, shows approximately 14 per cent less than its corresponding percentage for the state as a whole.

Responses received for the report covering the pay-roll which included the 15th of June, 1914, and of June, 1915, numbered only 928 by July 22, 1915. But the reports for the next month, July, 1915, were more encouraging, with 608 additional June reports and 1,222 July reports, by August 19, 1915. In August, 1915, field agents were assigned for the collection of outstanding reports and on September 15, 1915, there were on file 1,680 reports for June, 1,554 for July and 1,315 for August. The tabulation for the months of June, July and August, 1914, and June, July and August, 1915, was made on September 15, 1915, with 1,300 firms, for which the requisite complete data for the three months of each year were on file. The tables on page 44 show the number of reports received and the number tabulated each month; also the number of reports and employees tabulated for December, 1916, arranged by the industrial groups.

For the months following September, 1915, the tabulation was closed\* each month early enough to permit the analysis of the returns to be ready by the 12th of the month subsequent to the date included in the report. This was deemed necessary for the reason that one of the chief values of a review of the state of the labor market and of the volume of employment, as measured by the number of factory employees and total wages paid, lies in its timeliness.

\* The closing date for the first eight months was generally the 4th or 5th of the month. Thereafter, with the perfection of the office routine in editing and tabulating the reports, the tabulation was held open to include reports received up to the 7th of the month.

But this attempt to expedite the publication of the returns introduced a new factor in so far as late reports were concerned. It was obviously impossible to assume that each firm would always mail its report on time. Experience in other similar canvasses had demonstrated this. Nor was it thought practicable or feasible to secure tardy reports through the agency of the Bureau's field force, on account of the expense and time involved. Nevertheless, it seemed necessary that a fixed list of firms, reporting each and every month, should be established if comparison of total employees and wages were to be made from month to month.

To meet this problem, raised by delinquent firms, a plan was devised which would permit the comparison of returns from month to month even though the identical firms were not represented each month. The data for June, 1914, and for June, 1915, respectively, were taken as a base equal to 100 and the totals for each succeeding month of 1914 and 1915 were expressed as ratios to June, 1914, and June, 1915, respectively. This required reports for June, 1914, and June, 1915, for such firms as were used in any month and, through diligent work by the field agents, a comprehensive file of June, 1914, and June, 1915, reports was secured. Starting with September, 1915, care was exercised that no firm, which was large in relation to its industrial group and was previously included in the tabulation, was omitted. If delinquent, such a report was obtained by telegraph or by an agent. This course was found necessary because frequently one firm could have a preponderant influence in its industrial group if its fluctuation in relation to June was quite marked.

The feasibility of the plan adopted in the tabulation up to and including December, 1916,\* was predicated on the assumption that the amount of increase or decrease in the volume of employment from one month to another could be measured by comparing two ratios representing those two months. The two ratios, subject to comparison, were to be obtained by dividing the total employees for the two respective months by the June, 1914, total employees. The June, 1914, total of employees, in each case, was composed of the June, 1914, reports of those firms which reported in the two respective months. Following is an expression of this in concrete terms: it is assumed that the identical firms are tabulated, as to number of employees,† for June, 1914, and September, 1914, and that the ratio of September, 1914, to June, 1914, is 1.20; similarly that identical firms are tabulated for June, 1914, and October, 1914, but they are not the identical firms as were tabulated for September, 1914, the ratio of October, 1914, to June, 1914, being 1.50. The relation between September, 1914, and October, 1914, can then be expressed as  $\frac{1.50}{1.20}$  or 1.25, i. e. the ratio of October, 1914, to September, 1914,

is 1.25. This is equivalent to the statement that if September is 20 per cent higher than June, and October is 50 per cent higher than June, October is 25 per cent. higher than September. The number of substitutions of different firms (likewise the number of employees involved) from month to month was small in comparison to the total number tabulated, and experi-

\* Starting with January, 1917, the list was revised to a minor degree and an absolutely fixed list of reporting firms was established. The identical firms are included each month and it is necessary to collect by agents approximately forty reports out of a total of 1648.

† A similar tabulation was made in respect to total wages paid.



mental tabulations proved that this method involved but a very small percentage of over- or under-statement of conditions in some of the months.

The tabulation of the data each month included returns for four different months, viz., June, 1915; June, 1914; the current month of 1915; and the corresponding month of 1914. This permitted in each month a comparison of the total employees with a similar figure for the corresponding month of the preceding year, for identical firms.

Up to June, 1916, two series of ratios, or index numbers, were maintained, one of which was based on June, 1914, as 100, the other on June, 1915, as 100. The months of July, 1914, to May, 1915, were expressed as ratios to June, 1914; the months of July, 1915, to May, 1916, were expressed as ratios to June, 1915. In June, 1916, the latter series of index numbers, based on June, 1915, as 100, was recomputed so as to bring every month into the series which was based on June, 1914, as 100.

This readjustment of the series which was formerly based on June, 1915, as 100 was accomplished as follows: the ratio of June, 1915, to June, 1914, was obtained and used as the factor necessary to change the series from one base to another. Each month of the 1915 series, being a ratio expressed as  $\frac{\text{given month}}{\text{June, 1915}}$  was multiplied by the ratio  $\frac{\text{June, 1915}}{\text{June, 1914}}$  and, with the cancellation of June, 1915, the ratio became  $\frac{\text{given month}}{\text{June, 1914}}$ . If for example the ratio  $\frac{\text{June, 1915}}{\text{June, 1914}}$  was 1.10 and the ratio  $\frac{\text{October, 1915}}{\text{June, 1915}}$  was 1.20, the ratio  $\frac{\text{October, 1915}}{\text{June, 1914}}$  became 1.32, i. e.  $1.10 \times 1.20$ ; similarly, if the ratio  $\frac{\text{December, 1915}}{\text{June, 1915}}$  was 1.40, the ratio  $\frac{\text{December, 1915}}{\text{June, 1914}}$  became 1.54, i. e.  $1.10 \times 1.40$ .

With each month's totals from July, 1914, to May, 1916, expressed as a ratio to June, 1914, it became feasible to tabulate the reports each month beginning with June, 1916, and thereafter, so as to express the result first as a ratio to the corresponding month of 1915 and then as a ratio to June, 1914. As an example, consider the returns received as of September, 1916. By tabulating the reports for September, 1916, and September, 1915, for identical firms, a ratio is obtained as follows:  $\frac{\text{September, 1916}}{\text{September, 1915}}$ . With a

ratio already obtained for  $\frac{\text{September, 1915}}{\text{June, 1914}}$  the new ratio of  $\frac{\text{September, 1916}}{\text{June, 1914}}$  is derived by multiplication:  $\frac{\text{September, 1916}}{\text{September, 1915}} \times \frac{\text{September, 1915}}{\text{June, 1914}}$

The table of ratios, or index numbers, utilized in the preparation of the charts referring to factories appears on pages 45, 46.

#### Trade Union Idleness

From December, 1901, to June, 1916, the Bureau of Statistics and Information of the New York State Department of Labor secured monthly reports from representative trade unions, as to the amount of idleness among the membership of such unions, on the last\* working day of the month. In this

\* In order to coordinate the returns from the unions with those from factory pay-rolls, the date changed in July, 1915, so as to cover the 15th of the month.

Bulletin the charts depict monthly fluctuations of idleness from January, 1904, to June, 1916.

The schedule for the union report was mailed each month to the secretary of the union and that official was requested to state the following: Number of members in the union, number of members idle on the last working day because of (1) lack of work due to slack trade, weather conditions, lack of material, (2) strike or lockout or (3) sickness, accident or old age. Delinquent reports were secured by personal visit of an agent of the Bureau.

The plan of securing monthly reports from a selected list of unions was devised because it would have been an impossible task to collect and tabulate monthly returns from all the unions of the state. It was assumed — and later experience justified the assumption — that a representative union membership, chosen with regard to the proportion of members in each trade and the geographical distribution of the unions, would reflect industrial conditions which obtained among all organized wage earners. Reports were received from all unions in the state as to idleness at the end of March and September for each of the years for which representative union idleness is shown and there was a close approximation, for those months, between the idleness reported by all unions in the state and that reported by the representative list of unions.

The number of unions chosen for the representative list was designed to cover approximately one-fourth of the union membership of the state. As the numerical strength of organized labor increased from year to year, new unions were added to the representative list. Following is a statement of the number of unions and membership reporting as of December 31 of the respective years:

YEAR	NUMBER AND MEMBERSHIP OF REPRESENTATIVE UNIONS	
	NUMBER OF —	
	Unions	Members reporting as to idleness
1904.....	199	96,075
1905.....	192	91,767
1906.....	195	93,318
1907.....	194	97,732
1908.....	193	88,746
1909.....	192	91,162
1910.....	193	118,317
1911.....	190	115,430
1912.....	183	113,674
1913.....	237	156,910
1914.....	236	139,515
1915.....	246	152,638
1916*.....	262	192,613

As has been stated, in compiling the selected list, the aim was to preserve as far as possible the same proportionate representation of different industries and industrial centers, particularly the former, in the representative group as appeared in the membership of all unions in the state. The latest complete census of all unions in the state was made for the month of September, 1914, and a table has been prepared to show the relation between the

\* As of June 15.

membership of all unions and the representative unions on September 30, 1914. On that date, the representative list contained 232 unions, apportioned to these localities: 94 in New York City, 37 in Buffalo, 26 in Albany, 16 in Rochester, 11 in Syracuse and 54 in 30 other localities. The following table compares by industries, the distribution of members who were reported as to idleness, in the selected groups and in all unions at the end of September, 1914:

INDUSTRY	NUMBER OF MEMBERS		PERCENTAGE OF TOTAL IN EACH GROUP		Percentage of total group membership in representative unions
	All unions	Representative unions	All unions	Representative unions	
1. Building, stone working, etc.....	130,847	33,112	23.7	23.6	25.3
2. Transportation.....	72,326	22,659	13.1	16.1	31.3
3. Clothing and textiles.....	190,538	45,659	34.5	32.5	24.0
4. Metals, machinery and shipbuilding.....	33,544	8,426	6.1	6.0	25.1
5. Printing, binding, etc.....	31,103	7,507	5.6	5.4	24.1
6. Wood working and furniture.....	13,730	3,264	2.5	2.3	23.8
7. Food and liquors.....	17,066	4,238	3.1	3.0	24.8
8. Theaters and music.....	6,509	1,122	1.2	0.8	17.2
9. Tobacco.....	7,867	2,387	1.4	1.7	30.3
10. Restaurants, trade, etc.....	11,245	3,422	2.0	2.4	30.4
11. Public employment.....	18,250	4,283	3.3	3.1	23.5
12. Stationary engine tending.....	11,221	2,391	2.0	1.7	21.3
13. Miscellaneous.....	8,528	1,956	1.5	1.4	22.9
Total.....	552,774	140,426	100.0	100.0	25.4

The idleness shown for trade union membership in the charts on pages 25-36 represents idleness for *all* reasons. Separate tabulations of unemployment proper—that is, lack of work due to industrial maladjustments—reveal the fact that other contributing causes for idleness, such as labor disputes, sickness, and accidents, are inconsequential. The amount of idleness, attributable to incapacity of the worker on account of the last two reasons, is almost constant.

In tabulating the returns from trade unions, the reports were arranged by industrial groups and totals were obtained for the number of members reporting upon the question of idleness and the number of members reported as idle. The number idle was expressed as a percentage of the number reporting on the question. A table showing the percentage idle for each month for each industrial group appears on pages 47-50.

## NUMBER OF REPORTS ON EMPLOYEES AND WAGES FOR REPRESENTATIVE FACTORIES, RECEIVED AND TABULATED

MONTH AND YEAR*	Total number of reports received	Number of reports received on or before date specified	Number of reports tabulated
1915			
June.....	1,707	1,680 — September 15..	1,300
July.....	1,613	1,554 — September 15..	1,300
August.....	1,586	1,315 — September 15..	1,300
September.....	1,512	1,300 — October 7.....	1,266
October.....	1,493	1,297 — November 6....	1,272
November.....	1,487	1,254 — December 4....	1,228
December.....	1,567	1,284 — January 8.....	1,247
1916			
January.....	1,579	1,321 — February 4.....	1,271
February.....	1,600	1,253 — March 4.....	1,245
March.....	1,561	1,397 — April 4.....	1,275
April.....	1,508	1,406 — May 4.....	1,311
May.....	1,595	1,498 — June 5.....	1,439
June.....	1,582	1,527 — July 6.....	1,477
July.....	1,619	1,537 — August 5.....	1,475
August.....	1,621	1,499 — September 7....	1,451
September.....	1,620	1,563 — October 7.....	1,540
October.....	1,636	1,624 — November 8....	1,619
November.....	1,625	1,612 — December 8....	1,586
December.....	1,640	1,640 — January 7.....	1,639

## NUMBER OF REPRESENTATIVE FACTORIES AND EMPLOYEES TABULATED DECEMBER, 1916

INDUSTRY GROUPS	NUMBER OF —	
	Estab-lishments	Employees
I. Stone, clay and glass products.....	73	15,538
II. Metals, machinery and conveyances.....	350	226,624
III. Wood manufactures.....	136	28,650
IV. Furs, leather and rubber goods.....	138	47,948
V. Chemicals, oils, paints, etc.....	57	32,162
VI. Paper.....	26	9,375
VII. Printing and paper goods.....	135	44,520
VIII. Textiles.....	148	70,683
IX. Clothing, millinery, laundering, etc.....	394	83,022
X. Food, liquors and tobacco.....	169	49,316
XI. Water, light and power.....	13	4,303
Total.....	1,639	†612,141

\* Schedules for June, 1915, to May, 1916, inclusive, called for data for the corresponding month of the preceding year.

† It is estimated that this represents one-third of the factory workers of the State.

## INDEX NUMBERS OF TOTAL WAGES IN REPRESENTATIVE NEW YORK STATE FACTORIES, BASED ON JUNE, 1914, AS 100

INDUSTRY GROUPS	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sep.	Oct.	Nov.	Dec.
1914												
I. Stone, clay and glass products.....	100	82	87	89	88	81	76					
II. Metals, machinery and conveyances...	100	97	92	93	90	90	91					
III. Wood manufactures.....	100	95	96	99	98	95	92					
IV. Furs, leather and rubber goods.....	100	96	98	97	98	99	98					
V. Chemicals, oils, paints, etc.....	100	98	97	94	95	93	94					
VI. Paper.....	100	95	95	98	97	95	96					
VII. Printing and paper goods.....	100	97	98	99	99	99	97					
VIII. Textiles.....	100	97	85	95	98	96	94					
IX. Clothing, millinery, laundering, etc...	100	94	81	99	97	93	90					
X. Food, liquors and tobacco.....	100	102	102	103	102	96	92					
XI. Water, light and power.....	100	93	93	93	92	90	90					
Total.....	100	97	92	96	95	93	92					

1915												
I. Stone, clay and glass products.....	72	70	72	84	89	90	71	81	84	88	85	89
II. Metals, machinery and conveyances...	91	92	94	96	99	101	101	102	107	103	114	119
III. Wood manufactures.....	88	91	92	94	95	95	90	95	98	98	101	101
IV. Furs, leather and rubber goods.....	98	104	104	101	103	105	104	105	108	114	119	122
V. Chemicals, oils, paints, etc.....	93	95	94	99	101	105	106	107	105	106	107	113
VI. Paper.....	94	94	96	94	91	90	94	96	92	95	94	97
VII. Printing and paper goods.....	98	98	97	96	97	96	95	96	98	100	102	104
VIII. Textiles.....	92	95	94	95	98	97	98	95	99	104	104	105
IX. Clothing, millinery, laundering, etc...	93	99	99	96	95	96	90	90	98	101	100	98
X. Food, liquors and tobacco.....	90	88	88	86	88	92	95	95	95	97	96	93
XI. Water, light and power.....	89	88	87	87	86	87	86	89	90	89	90	90
Total.....	92	94	94	95	97	98	97	96	101	102	106	108

1916												
I. Stone, clay and glass products.....	86	86	90	101	99	102	95	101	101	103	107	107
II. Metals, machinery and conveyances...	122	127	126	132	134	135	133	133	139	139	145	150
III. Wood manufactures.....	100	103	105	106	101	102	102	105	107	106	108	109
IV. Furs, leather and rubber goods.....	122	125	125	127	127	128	128	130	126	129	133	132
V. Chemicals, oils, paints, etc.....	114	115	116	123	124	126	126	127	125	123	123	127
VI. Paper.....	100	101	99	103	104	106	105	109	107	108	113	118
VII. Printing and paper goods.....	103	104	106	104	104	103	105	106	108	108	107	110
VIII. Textiles.....	107	109	108	109	102	106	106	101	104	106	109	112
IX. Clothing, millinery, laundering, etc...	101	103	104	106	98	95	91	89	104	103	103	101
X. Food, liquors and tobacco.....	89	89	91	91	89	92	94	95	94	96	99	98
XI. Water, light and power.....	89	87	88	89	88	91	91	91	95	95	96	100
Total.....	108	111	111	115	113	113	112	113	117	117	120	122

INDEX NUMBERS OF TOTAL EMPLOYEES IN REPRESENTATIVE NEW YORK STATE FACTORIES  
BASED ON JUNE, 1914, AS 100

INDUSTRY GROUPS	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sep.	Oct.	Nov.	Dec.
	1914											
I. Stone, clay and glass products.....	100	83	85	80	87	81	80					
II. Metals, machinery and conveyances..	100	95	90	91	87	87	90					
III. Wood manufactures.....	100	95	96	101	90	95	95					
IV. Furs, leather and rubber goods.....	100	93	91	94	95	90	99					
V. Chemicals, oils, paints, etc.....	100	97	95	92	91	89	95					
VI. Paper.....	100	100	100	100	101	101	101					
VII. Printing and paper goods.....	100	97	97	100	98	99	99					
VIII. Textiles.....	100	96	81	88	91	93	92					
IX. Clothing, millinery, laundering, etc...	100	92	85	101	98	90	86					
X. Food, liquors and tobacco.....	100	101	99	102	100	95	93					
XI. Water, light and power.....	100	98	98	97	95	94	97					
Total.....	100	95	91	95	93	91	92					
	1915											
I. Stone, clay and glass products.....	73	69	72	80	88	89	74	81	85	92	89	93
II. Metals, machinery and conveyances..	88	91	94	98	101	104	105	105	110	100	123	130
III. Wood manufactures.....	88	91	95	96	98	98	91	97	103	110	114	114
IV. Furs, leather and rubber goods.....	97	103	101	93	102	102	103	104	107	119	128	129
V. Chemicals, oils, paints, etc.....	96	95	96	99	104	107	108	109	106	109	110	118
VI. Paper.....	97	100	99	97	94	93	103	103	98	108	104	108
VII. Printing and paper goods.....	102	97	100	97	98	97	96	96	99	102	104	107
VIII. Textiles.....	91	93	94	90	99	97	99	101	102	110	112	112
IX. Clothing, millinery, laundering, etc...	90	101	103	97	94	94	87	84	96	108	106	100
X. Food, liquors and tobacco.....	90	88	89	88	92	94	97	96	96	101	100	99
XI. Water, light and power.....	90	87	91	88	88	89	88	92	92	89	92	96
Total.....	91	93	95	95	98	99	99	99	103	107	113	116
	1916											
I. Stone, clay and glass products.....	87	85	94	102	109	114	96	116	121	125	136	137
II. Metals, machinery and conveyances..	132	140	141	150	155	156	155	155	167	168	177	189
III. Wood manufactures.....	108	111	116	116	112	114	113	117	124	128	136	135
IV. Furs, leather and rubber goods.....	129	131	133	134	137	142	144	143	139	149	161	167
V. Chemicals, oils, paints, etc.....	121	120	122	133	137	140	140	141	139	137	141	151
VI. Paper.....	111	112	113	118	126	131	131	130	130	133	141	149
VII. Printing and paper goods.....	106	105	111	109	108	107	108	109	114	113	116	119
VIII. Textiles.....	113	117	117	121	117	122	122	120	123	126	131	137
IX. Clothing, millinery, laundering, etc...	104	113	117	121	104	108	93	101	120	117	117	113
X. Food liquors and tobacco.....	93	96	100	101	101	106	105	106	107	111	116	115
XI. Water, light and power.....	94	91	94	94	99	103	101	100	104	104	106	109
Total.....	116	121	123	129	128	130	128	130	137	139	144	150

## PERCENTAGE OF MEMBERS OF REPRESENTATIVE TRADE UNIONS IDLE AT THE END\* OF EACH MONTH, BY INDUSTRIES

YEAR	Jan.	Feb.	Mar.	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
<i>Metals, Machinery and Shipbuilding</i>												
1904.....	13.7	13.8	13.0	13.3	16.1	14.7	13.2	10.0	8.0	9.5	8.8	8.8
1905.....	9.4	7.9	6.2	4.1	4.6	4.2	5.0	4.7	4.5	3.4	4.1	3.8
1906.....	7.1	5.1	5.4	4.5	4.7	4.8	3.5	4.0	2.8	8.8	7.5	6.2
1907.....	5.5	5.6	3.7	4.5	4.9	4.4	5.4	7.4	12.0	16.0	24.7	30.9
1908.....	30.1	35.0	32.4	37.4	35.3	31.9	29.9	23.9	26.5	22.8	21.7	20.9
1909.....	25.7	24.8	17.9	15.3	14.5	13.2	14.3	8.9	8.7	5.9	7.1	8.5
1910.....	9.8	9.1	6.4	6.0	5.7	6.1	6.1	6.9	8.2	9.1	9.2	9.7
1911.....	10.5	12.9	18.8	16.8	32.7	33.9	31.0	26.2	28.0	26.8	25.4	24.4
1912.....	17.0	15.6	12.3	14.6	13.4	12.8	8.5	8.3	8.3	8.4	7.5	10.2
1913.....	7.6	9.1	6.8	6.7	6.7	9.1	8.3	10.0	9.0	9.5	21.4	16.2
1914.....	15.7	18.4	16.2	16.5	16.0	13.9	17.4	19.4	21.1	24.9	30.6	32.0
1915.....	28.8	24.9	26.8	21.8	13.8	9.9	11.9	8.1	6.5	18.6	5.0	4.0
1916.....	3.6	2.9	16.1	8.3	8.7	7.2	....	....	....	....	....	....

*Clothing and Textiles*

1904.....	30.0	20.5	28.3	39.4	35.7	38.4	37.1	19.1	18.9	16.3	14.1	14.4
1905.....	15.2	12.8	16.3	11.3	7.3	10.2	11.1	9.6	11.9	10.8	8.5	7.3
1906.....	8.1	12.5	10.2	9.4	10.4	5.3	5.2	3.5	8.0	9.4	8.4	11.5
1907.....	5.4	9.2	6.5	8.2	10.8	8.2	15.4	7.1	10.7	35.5	36.4	43.6
1908.....	44.1	43.9	46.8	49.6	48.6	45.2	22.8	19.0	29.2	24.1	21.4	16.6
1909.....	11.8	14.6	16.4	27.2	20.3	23.1	13.0	13.7	23.8	23.7	17.0	21.4
1910.....	29.3	19.9	32.2	36.0	32.6	30.7	51.0	57.8	15.7	26.1	29.4	47.9
1911.....	35.1	21.4	19.0	17.5	38.7	27.4	15.2	3.0	3.8	4.5	28.5	59.4
1912.....	34.8	7.4	14.6	13.3	38.0	52.1	52.9	8.0	2.0	6.4	35.4	80.2
1913.....	68.3	56.6	30.1	35.1	39.6	35.7	33.2	30.8	23.4	27.6	45.1	65.0
1914.....	42.4	37.4	33.8	26.2	28.3	31.5	57.0	47.9	27.8	30.0	56.4	47.9
1915.....	64.4	38.1	27.2	31.2	56.6	36.3	38.3	20.1	12.6	9.1	24.0	31.5
1916.....	44.7	15.9	13.5	12.4	16.0	27.7	....	....	....	....	....	....

*Printing, Binding, Etc.*

1904.....	15.0	11.0	16.0	10.4	11.3	12.4	10.8	9.9	8.5	9.8	9.8	9.4
1905.....	7.3	7.3	7.2	8.6	8.6	13.8	9.3	9.2	11.3	10.8	13.0	12.1
1906.....	19.6	18.9	18.1	17.0	16.9	16.3	15.8	15.7	15.5	15.8	14.4	13.2
1907.....	12.9	12.8	13.1	11.5	11.6	11.5	11.5	10.3	12.1	12.3	11.7	11.1
1908.....	21.2	21.7	21.8	21.7	22.3	21.6	19.6	17.5	14.5	13.9	13.6	15.0
1909.....	11.0	12.1	10.9	11.6	9.9	12.6	6.4	7.4	8.1	6.8	7.1	9.2
1910.....	5.9	7.2	6.6	7.8	6.8	6.4	3.1	3.3	2.8	2.8	3.4	4.0
1911.....	4.6	4.8	4.6	8.5	6.7	4.6	3.3	3.8	4.0	5.6	6.0	6.1
1912.....	4.3	4.1	7.8	5.1	5.2	6.5	9.3	5.9	6.7	5.1	5.1	3.3
1913.....	6.3	6.4	8.7	6.3	6.5	6.1	4.4	7.4	4.8	10.9	7.4	9.4
1914.....	8.2	7.4	8.5	10.3	9.9	10.1	11.1	11.9	14.7	12.8	12.4	6.9
1915.....	9.3	8.6	10.0	9.7	9.9	9.6	10.9	11.0	10.0	9.3	8.4	7.4
1916.....	7.3	6.6	7.2	6.6	6.2	6.6	....	....	....	....	....	....

\*The reporting date from July, 1915, to June, 1916, was the fifteenth of the month.

PERCENTAGE OF MEMBERS OF REPRESENTATIVE TRADE UNIONS IDLE AT THE END OF EACH MONTH, BY INDUSTRIES—Continued

YEAR	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
<i>Wood Working and Furniture</i>												
1904.....	37.0	33.7	34.4	27.0	26.3	28.7	36.8	27.6	25.2	19.3	18.5	26.2
1905.....	24.8	33.0	34.1	21.1	14.7	9.3	12.1	12.5	12.6	3.9	4.0	3.3
1906.....	14.5	13.2	13.2	15.3	11.9	10.8	13.5	10.9	9.0	7.5	6.9	12.9
1907.....	19.7	15.4	16.8	18.4	20.2	17.0	10.9	11.4	9.3	23.3	23.9	27.9
1908.....	39.3	46.1	41.7	38.8	37.5	36.7	25.9	36.3	27.9	22.6	23.1	22.1
1909.....	20.3	19.5	15.1	15.3	13.3	13.9	12.8	9.7	13.5	8.0	7.2	10.6
1910.....	14.0	14.6	10.8	11.4	11.8	6.7	7.1	8.0	8.4	7.2	8.8	17.1
1911.....	23.2	22.1	23.6	21.4	18.3	19.6	13.5	17.5	19.1	16.4	17.8	20.1
1912.....	26.1	26.1	23.6	21.6	18.3	19.3	16.1	12.6	11.3	8.5	10.1	19.6
1913.....	26.8	28.9	26.2	23.5	18.6	16.1	14.4	18.0	18.8	20.1	23.9	24.7
1914.....	35.2	41.3	41.4	32.6	28.8	25.9	31.2	31.7	31.9	27.5	29.5	31.7
1915.....	36.1	38.1	38.2	29.0	24.4	23.2	25.4	23.7	16.4	14.1	13.8	13.0
1916.....	15.4	18.4	17.7	12.8	20.5	25.6	.....	.....	.....	.....	.....	.....

<i>Food and Liquors</i>												
1904.....	6.3	7.2	6.6	7.2	7.1	5.8	5.9	7.4	8.2	16.9	10.6	10.9
1905.....	9.3	9.7	8.4	7.7	6.6	5.8	5.2	6.0	7.3	6.9	6.6	6.3
1906.....	7.4	6.9	6.0	16.9	7.5	5.2	5.6	5.5	7.2	6.1	5.5	5.6
1907.....	8.2	8.7	7.4	5.2	5.4	5.6	5.3	6.6	8.3	9.1	9.0	10.1
1908.....	11.4	10.6	11.7	10.8	11.0	10.8	10.0	10.4	11.5	11.9	11.6	10.6
1909.....	11.5	11.7	10.9	10.7	9.3	9.4	7.0	7.4	8.2	8.6	10.2	9.9
1910.....	9.8	9.9	9.2	11.0	21.0	23.5	21.9	10.3	10.7	7.9	8.7	9.1
1911.....	10.7	9.0	10.4	9.2	8.4	6.9	8.1	7.0	8.8	7.6	7.8	8.2
1912.....	10.5	9.8	10.2	9.5	11.3	10.7	10.2	9.8	9.7	9.6	8.6	8.7
1913.....	9.0	8.7	9.5	10.6	11.3	9.0	11.1	12.4	9.5	11.0	10.3	11.4
1914.....	10.2	13.1	12.0	10.7	11.8	11.4	12.6	12.5	12.6	13.5	15.0	14.7
1915.....	14.6	14.0	16.8	15.0	14.2	13.5	12.5	13.3	12.3	12.9	11.9	11.4
1916.....	11.8	11.2	11.5	11.2	11.1	9.7	.....	.....	.....	.....	.....	.....

<i>Tobacco</i>												
1904.....	5.6	7.7	7.9	10.5	7.4	8.7	10.2	4.1	4.7	3.4	2.8	9.8
1905.....	5.6	6.0	6.6	8.4	5.2	3.6	8.3	7.8	2.9	2.2	2.3	10.9
1906.....	4.7	8.8	6.9	4.8	3.7	3.3	5.1	3.1	7.2	2.7	2.4	6.2
1907.....	5.4	5.7	4.3	4.9	10.7	8.5	6.5	4.4	4.9	3.4	17.7	55.0
1908.....	12.9	16.4	14.7	18.3	12.9	9.1	14.6	13.3	14.5	15.2	13.0	30.3
1909.....	14.0	14.2	17.1	16.1	17.7	16.9	8.0	9.0	7.1	4.4	3.5	20.6
1910.....	12.0	12.0	13.6	21.7	22.4	22.6	3.8	3.7	6.6	3.2	3.1	7.9
1911.....	6.1	9.3	7.2	10.6	9.3	15.5	11.0	9.4	9.2	8.1	7.7	50.2
1912.....	15.5	10.8	9.9	13.3	11.3	9.2	6.1	4.2	3.5	2.8	2.9	3.2
1913.....	8.0	6.2	10.0	5.1	5.2	3.8	5.0	4.8	3.3	5.0	3.8	59.4
1914.....	14.2	17.7	15.7	15.6	12.8	48.2	24.5	23.5	25.4	22.5	14.8	75.9
1915.....	21.2	26.0	27.5	22.9	9.9	9.6	6.9	7.0	9.7	8.9	4.2	3.0
1916.....	7.4	6.7	9.1	9.7	4.9	5.8	.....	.....	.....	.....	.....	.....



## PERCENTAGE OF MEMBERS OF REPRESENTATIVE TRADE UNIONS IDLE AT THE END OF EACH MONTH, BY INDUSTRIES — Continued

YEAR	Jan.	Feb.	Mar.	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
<i>Restaurants, Trade, Etc.</i>												
1904.....	9.6	9.9	8.0	7.7	5.1	3.1	16.1	4.3	9.1	4.6	5.8	5.4
1905.....	7.7	9.5	8.5	4.1	3.6	3.8	4.9	5.6	6.7	13.0	7.3	11.3
1906.....	8.1	8.8	5.5	5.1	3.9	3.6	2.6	1.7	7.1	4.9	4.4	3.9
1907.....	3.4	6.0	4.2	5.7	4.9	3.1	5.8	3.1	4.5	11.5	10.4	15.2
1908.....	8.6	9.4	17.3	12.6	10.6	11.6	14.5	11.4	10.5	8.1	9.3	9.6
1909.....	9.2	8.3	7.8	7.2	6.1	5.3	4.5	4.8	5.6	6.0	6.6	7.2
1910.....	6.1	6.8	3.5	5.8	4.7	4.6	8.3	4.0	5.0	4.8	4.8	6.3
1911.....	4.4	4.9	5.8	3.6	3.3	2.8	3.9	3.6	10.7	6.2	6.3	7.5
1912.....	7.5	7.1	9.0	6.8	4.3	4.5	4.8	4.3	2.3	4.7	4.4	4.2
1913.....	5.7	5.3	3.6	4.9	4.5	5.2	5.4	6.1	8.3	7.0	7.5	8.8
1914.....	11.7	12.3	11.7	10.5	9.4	12.8	10.5	12.9	14.2	16.9	17.8	21.2
1915.....	16.5	16.2	15.7	14.0	15.8	12.0	12.2	9.2	10.1	10.7	12.0	11.4
1916.....	12.6	15.3	13.1	10.0	8.1	4.0	....	....	....	....	....	....
<i>Building, Stone Working, Etc.</i>												
1904.....	38.3	31.2	42.6	12.8	9.3	11.9	12.9	19.8	15.2	12.6	17.1	32.9
1905.....	41.5	32.6	31.8	18.8	12.8	12.7	5.6	4.5	2.5	5.2	7.5	8.4
1906.....	14.3	16.4	9.4	6.7	7.6	6.4	10.8	6.9	6.4	7.3	10.2	19.2
1907.....	40.4	36.1	32.5	17.7	14.9	10.7	11.4	18.5	18.1	25.1	32.5	42.1
1908.....	55.6	56.3	53.6	42.2	38.3	36.3	39.5	35.5	34.3	35.2	36.7	44.3
1909.....	52.3	46.2	34.7	29.0	23.5	21.5	17.8	13.8	16.7	16.5	18.5	29.7
1910.....	38.9	37.0	33.6	20.3	17.9	19.6	15.6	13.7	18.9	19.5	23.5	30.4
1911.....	36.8	44.5	47.7	34.1	31.5	29.6	20.9	20.9	18.0	21.8	26.6	35.5
1912.....	43.3	40.0	38.2	19.9	20.4	15.6	10.2	11.8	10.2	12.3	12.6	19.9
1913.....	27.7	29.1	27.9	19.6	17.7	21.9	22.5	20.9	20.3	24.3	28.5	41.4
1914.....	47.4	50.1	45.3	40.2	33.2	35.5	30.5	32.8	35.7	35.0	44.0	48.2
1915.....	51.8	52.8	46.0	41.2	36.2	38.2	35.3	33.6	28.9	23.9	23.9	30.9
1916.....	34.8	36.0	37.3	27.5	27.7	29.7	....	....	....	....	....	....
<i>Transportation</i>												
1904.....	40.6	37.7	42.1	33.2	35.3	7.7	8.6	8.8	9.2	6.5	6.2	28.8
1905.....	30.8	26.4	25.5	13.7	6.3	6.6	7.7	6.8	4.2	3.2	3.7	29.2
1906.....	32.6	29.8	23.6	4.2	4.3	5.9	4.3	3.3	4.6	4.3	4.5	29.1
1907.....	28.2	26.5	25.3	5.1	9.2	6.3	4.0	17.8	13.0	13.1	11.7	38.5
1908.....	40.7	38.3	40.6	37.2	36.1	32.4	26.4	25.4	22.2	21.5	13.7	37.8
1909.....	36.7	31.5	34.2	22.1	20.0	20.3	19.5	18.5	18.0	17.4	16.6	30.2
1910.....	30.5	30.0	30.3	8.1	5.4	5.9	5.8	5.9	5.7	6.7	8.4	24.9
1911.....	32.5	31.9	31.4	26.8	22.9	17.6	7.5	10.2	10.4	5.8	10.4	31.0
1912.....	9.3	10.9	9.3	8.8	7.5	7.4	6.9	9.3	4.7	4.0	4.7	7.2
1913.....	13.8	12.3	11.0	7.4	7.2	7.9	6.7	7.5	6.9	7.2	9.6	14.8
1914.....	17.2	13.4	14.8	11.5	8.6	12.7	11.4	14.4	14.2	14.1	12.6	17.5
1915.....	20.0	19.8	18.1	14.8	13.8	11.2	12.0	11.4	10.1	8.2	8.4	8.9
1916.....	11.1	11.4	8.2	6.8	3.9	2.9	....	....	....	....	....	....

PERCENTAGE OF MEMBERS OF REPRESENTATIVE TRADE UNIONS IDLE AT THE END OF EACH MONTH, BY INDUSTRIES — Concluded

YEAR	Jan.	Feb.	Mar.	April	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
<i>Theaters and Music</i>												
1904.....	9.9	9.2	11.3	13.1	12.5	15.6	17.4	15.6	13.6	13.3	12.7	12.4
1905.....	12.4	13.1	12.2	8.6	10.5	15.8	24.7	21.1	11.6	4.9	4.9	4.9
1906.....	7.6	4.9	6.1	4.8	5.2	4.8	24.8	10.7	4.2	7.3	6.8	6.8
1907.....	3.0	3.0	7.1	10.8	11.3	15.3	7.0	4.0	4.4	4.5	4.4	4.4
1908.....	4.6	4.8	5.1	10.0	40.9	43.2	26.1	22.0	13.4	9.6	6.5	6.5
1909.....	5.0	0.0	0.0	3.4	0.2	29.4	11.0	0.3	8.7	0.2	0.2	0.4
1910.....	0.3	0.3	0.2	0.2	11.7	30.3	41.3	39.7	36.0	0.2	0.2	0.3
1911.....	0.3	0.2	3.9	48.8	46.2	52.5	45.9	11.4	0.2	6.5	4.5	4.4
1912.....	0.3	0.4	0.5	13.9	40.6	66.9	45.0	19.5	0.3	0.3	0.4	0.4
1913.....	0.5	0.0	0.7	16.9	16.9	66.6	54.2	0.3	0.0	0.3	0.3	0.0
1914.....	0.0	0.0	0.0	16.5	51.3	53.8	56.2	55.1	8.9	0.0	0.0	0.0
1915.....	5.6	7.0	11.7	37.1	46.3	55.6	83.5	46.5	2.3	0.9	0.9	3.8
1916.....	0.0	0.9	0.9	1.5	3.7	27.8	.....	.....	.....	.....	.....	.....

<i>Stationary Engine Tending</i>												
1904.....	3.5	3.2	3.5	2.4	3.3	4.6	5.1	3.9	3.1	2.8	1.9	1.8
1905.....	1.6	1.6	1.1	2.8	2.8	3.1	2.7	2.7	3.0	2.4	2.7	3.9
1906.....	2.2	1.8	1.6	2.5	2.0	1.7	0.8	2.1	2.4	1.9	1.9	0.7
1907.....	1.3	1.8	1.5	2.6	1.0	1.3	1.4	1.3	1.3	1.7	2.9	3.2
1908.....	3.4	3.3	3.4	3.2	2.5	3.1	2.4	2.9	3.9	2.9	3.3	2.8
1909.....	2.5	2.2	1.7	1.6	1.8	1.7	1.3	1.0	1.7	1.5	0.9	1.0
1910.....	1.0	1.0	1.0	1.3	1.3	1.1	0.9	1.0	1.7	2.0	2.3	2.1
1911.....	2.0	1.8	2.0	1.5	1.7	1.3	1.6	2.0	2.4	1.4	1.7	1.6
1912.....	1.9	2.7	2.6	2.2	2.0	1.9	1.2	1.5	1.6	1.4	1.3	2.2
1913.....	1.9	1.8	2.3	1.6	1.6	1.3	1.5	2.1	2.3	3.0	3.0	2.3
1914.....	1.9	1.7	2.3	2.3	2.3	2.7	2.6	4.1	3.9	4.4	4.7	3.2
1915.....	4.8	4.1	3.9	4.1	4.3	4.0	4.2	4.2	3.9	4.5	3.2	3.7
1916.....	5.1	3.9	2.5	3.3	2.5	2.8	.....	.....	.....	.....	.....	.....

<i>All Industries Combined</i>												
1904.....	25.8	21.6	27.1	17.0	15.9	13.7	14.8	13.7	12.0	10.8	11.1	19.6
1905.....	22.5	19.4	19.2	11.8	8.3	9.1	8.0	7.2	5.9	5.6	6.1	11.1
1906.....	15.0	15.3	11.6	7.3	7.0	6.3	7.6	5.8	6.3	6.9	7.6	15.4
1907.....	21.5	20.1	18.3	10.1	10.5	8.1	8.5	12.1	12.3	18.5	22.0	32.7
1908.....	36.9	37.5	37.5	33.9	32.2	30.2	26.8	24.6	24.6	23.1	21.5	28.0
1909.....	29.3	26.5	23.0	20.3	17.1	17.4	13.9	11.9	14.5	13.7	13.3	20.6
1910.....	24.5	22.4	22.6	16.0	14.5	15.4	19.4	22.3	12.5	15.0	17.5	27.3
1911.....	26.7	24.8	25.6	21.3	27.2	22.9	15.5	11.7	11.2	11.6	20.0	34.2
1912.....	25.8	17.6	18.8	13.3	20.1	22.8	21.1	9.1	5.9	7.4	15.3	30.1
1913.....	38.2	33.4	21.8	21.7	22.9	22.2	20.8	19.6	16.2	19.3	27.8	40.0
1914.....	32.3	30.7	28.3	23.6	22.7	25.5	32.5	30.3	24.3	24.9	35.8	35.7
1915.....	40.1	32.2	27.4	26.4	31.8	25.5	26.0	19.3	14.9	12.7	17.6	21.9
1916.....	30.9	17.0	16.4	13.2	14.6	20.4	.....	.....	.....	.....	.....	.....

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**DANGERS IN THE MANUFACTURE**  
**AND INDUSTRIAL USES OF**  
**WOOD ALCOHOL**

**Prepared by**  
**THE DIVISION OF INDUSTRIAL HYGIENE**



## DANGERS IN THE MANUFACTURE AND INDUSTRIAL USES OF WOOD ALCOHOL

Wood alcohol<sup>1</sup> is the most dangerous and most prevalent industrial poison of the alcohols used in the various trades. It produces toxic effects whether taken internally, inhaled through the lungs, or when coming directly in contact with the skin. Impairment of vision, complete loss of eyesight, and even death result from drinking as well as from inhaling wood alcohol. People working in places where large quantities of wood alcohol were used constantly have died from inhaling the fumes. So dangerous is this poison that in some cases death occurred when persons were subjected only a day or two to the fumes of wood alcohol. Direct action of wood alcohol upon the skin when used externally, although not quite as disastrous, has its serious consequences. It produces inflammation of the skin, and in extreme cases death of the affected organ.

The disastrous consequences from drinking pure wood alcohol or any liquid containing it are brought to the attention of the public at intervals in newspaper accounts of epidemics of such poisoning, or when some state food commissioner inaugurates a crusade against manufacturers who adulterate liquors or drugs with wood alcohol. Even the humblest are likely to secure this information. But little information has been given in popular form to those who are obliged to work with material containing wood alcohol, of the dangers from inhaling its vapors or when the liquid comes in contact with the skin. Complete knowledge of its deleterious effects upon the health must be given to every person handling it, as well as full protection. This is the only guarantee against skin inflammation, blindness and death. This investigation indicates that mere publication of technical or unofficial semi-technical matter is insufficient. Although numerous publications

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<sup>1</sup> Wood alcohol is also popularly known as "wood spirit," "carbinol," "methanol," "methyl hydrate," and "wood naphtha." Technically, wood alcohol is called "methyl alcohol." In the United States wood alcohol is manufactured almost entirely from the destructive distillation of wood. This is how it derived its popular name.

For a comprehensive study of the chemistry, technology, pharmacology and legislation pertaining to wood alcohol, see Charles Baskerville's Report on Wood Alcohol, in Second Report of the Factory Investigating Commission, 1913, Vol. II, pp. 921-1042.

have been issued, workers are still ignorantly subjected to the dangers arising from the manufacture and use of wood alcohol in the various industries. Recommendations for the necessary precautions to avert evil effects are made on the basis of this investigation. By instituting the improvements recommended employers will not only protect the health of their employees, but will also conserve much of the product which is now being wasted. Nor will the adoption of the simple rules recommended involve great expense.

This investigation naturally divides itself into a study of (1) the conditions underlying the manufacture of wood alcohol, and (2) its use in the various industries.

### THE MANUFACTURE OF WOOD ALCOHOL

Twenty-eight establishments in the State are engaged in the production of wood alcohol. The industry employs four hundred persons, all of whom are male. These industries are chiefly located in Delaware and Sullivan counties, where the raw material grows in abundance, water abounds in large quantities, land is cheap, and the cost of hauling both raw and finished product is low.

To secure the destructive distillation of wood it is placed in oval or cylindrical iron or steel retorts or ovens and subjected to heat. The retorts are set in brickwork and each retort is provided with a heavy cast iron, tightly fitting door. A stack leads from each furnace to the outer air, and an outlet or delivery pipe leads from each retort to a condenser into which the vapor containing wood alcohol and other substances is conducted.

The cord wood, from which the alcohol is made, is carefully stacked in the retort until the chamber is completely filled. When cars are used to charge retorts or ovens, holding approximately eight to ten cords, the entire charge is loaded on cars and run in on rails. Entrances to ovens are shown in Figure 1.

Coal is used for fuel to heat the retorts. When sufficient heat is applied destructive distillation of the wood takes place. The gaseous products pass over, most of them condensing in their progress. What is known as the permanent gas, however, passes along and is utilized for fuel beneath boilers or furnaces.

If the retort doors are broken, or do not fit properly, gases and vapors escape which are not alone a source of danger to the plant, or an

irritation to the eyes of the workmen, but constitute a loss of product. While it is highly desirable that retorts should be ventilated, it should not be done in this unsafe manner. Manufacturers should make it an inviolable rule to immediately repair damaged or defective retort doors.

Escaped smoke and gases from retorts should properly be conducted to the furnace rooms. These are usually large frame structures with monitor roof construction. Fires are of common occurrence in these furnaces due to the sparks and cinders lodging in the under side of the



Figure 1

Entrances to ovens or retorts, showing rails on which cars containing the cut wood, are run into the retorts.

roof, where dust is deposited from the retorts and coal pits. Corrugated iron roofs are rapidly eliminating the danger from this source.

Instead of burning the non-condensable gases under boilers or furnaces, some manufacturers burn them underneath the retorts. This method is dangerous and should under no circumstances be practiced.

In some instances explosions have occurred because of back pressure of burning gas from furnace to retort. As a result retort doors were blown off and workmen standing nearby were killed. Various methods are practiced to prevent back pressure of burning gas. Providing an

outlet pipe with valves from the main duct at a point beyond all branch-pipe connections from retorts, is an effective preventive for back pressure. A second method is by providing valves in each branch leading from each retort to a main. The valve should be closed before opening



**Figure 2**

Shows steam jet attached to main to pull along the permanent gas from the first condensers, attached to retorts.

the retort for cleaning. This prevents the gas from adjoining retorts from entering the opened retort. An additional precaution against back pressure of burning gases is that of connecting a steam jet to the



main pipe. The force of the steam aids in the outward movement of the gas, and the added forward pressure prevents a back pressure.

Four fires were reported during the summer months of 1916. They were caused by spontaneous combustion as a result of opening the coolers before the charcoal had cooled sufficiently. On one occasion a fire occurred in a freight car after it was loaded. Few such fires now occur, owing to the Federal regulation requiring that charcoal be kept twenty-four hours in coolers and forty-eight hours in the dumping shed before



Figure 3

Kiln located on top of retorts, no platform provided on which man can stand while spreading, turning or shoveling the acetate of lime, placed here to dry.

shipping. These precautions are all thoroughly understood by the manufacturers.

In the course of manufacture the condensed liquid is neutralized with lime, thereby becoming converted into acetate of lime. The acetate of lime is then dried in kilns. They are usually located on the top of retorts so that the radiant heat from the retorts can be utilized for the drying process. The acetate of lime must be spread out by hand shoveling. Employees doing this work are exposed to a temperature

ranging from 90 to 100 degrees, during the summer. The temperature of the floor upon which the workmen stand is even higher.

Platforms or footways should be furnished for the workmen to stand upon while performing the work. In such places where area of kiln or space would not permit the erection of such a board-runway, wooden shoes, which do not conduct heat readily, should be worn by the men. This would greatly aid them in the performance of the work.

Another method practiced in drying, which, from a standpoint of



**Figure 4**

Kiln showing platform on which men can walk, or stand, while spreading the acetate of lime on the floor; arrows indicate platforms.

comfort to workers, exceeds the above, is to locate the kiln in a room adjoining the furnaces. The heat collected from the furnaces is communicated to the floor of the adjoining kiln-room, thence discharged up a stack to outer air.

Tar is one of the by-products in the manufacture of wood alcohol. The lime and alcohol stills, condensers, mixing tubs, and vats for separating the tar from the liquid are invariably located in the still house. Condensers were found that discharged non-condensed gases into the workroom. These gases are injurious to health and should be carried

outside the workroom. In many of the still houses the vats were located both below and above the floor level. Vats so located should either be provided with railings or covers in order to avert the danger of tripping over or falling into them.

Fires are a frequent occurrence in still houses. The cause of the fires was traced to the following conditions. Motors of a single phase type were found in these still houses. Gases were also noticed, and these no doubt occasionally become ignited by the sparks thrown off by the



**Figure 5**

Illustrates a man provided with a helmet, who is supplied with fresh air through a hose. Air is supplied from point where it is uncontaminated with fumes. A device like the above could be used in still cleaning.

armatures of the motors. In this case two precautions are necessary to avoid fires. The vapors or gases should be prevented from entering the work room. This, of course, can be accomplished by occluding them. If, however, gases are discharged the point of origin is the only place for removal. Should there still be any danger of gases entering the work room, fires or explosions can be prevented by using squirrel cage motors instead of the single phase types.

It is very important to prevent large quantities of gas from entering the still house. During winter months, when every aperture is closed in order to keep the still house fairly warm, the escape of gases and vapors from mixing vats and other sources causes amblyopia, or temporary blindness, to workers engaged in these still houses.

Artificial lighting is necessary in all of the plants engaged in this line of manufacture, and while found to be mainly electric, some firms are still using torches and lanterns. One plant was equipped with globes of the vapor proof variety. In all of these factories, artificial lighting is used when cleaning or repairing stills. In two instances explosions occurred due to the breaking of the electric light globe, in which cases the sufficient residual glow of the filament, after breaking, ignited the gases present. In one still house gases were ignited by a kerosene torch light.

At intervals of two months stills are usually cleaned to remove tar accumulations. This makes it necessary for workmen to enter them. Frequently workmen engaged in this process have contracted cases of amblyopia. A helmet similar to the one in Figure 5 would protect the workmen entering the still.

The tar is stored in vats which are generally located outside the buildings and are usually sunken in the ground. Many of these vats were found uncovered. This is wasteful. To prevent evaporation the vats should be covered, but vented. Besides, safety demands rails or covers to prevent accidents.

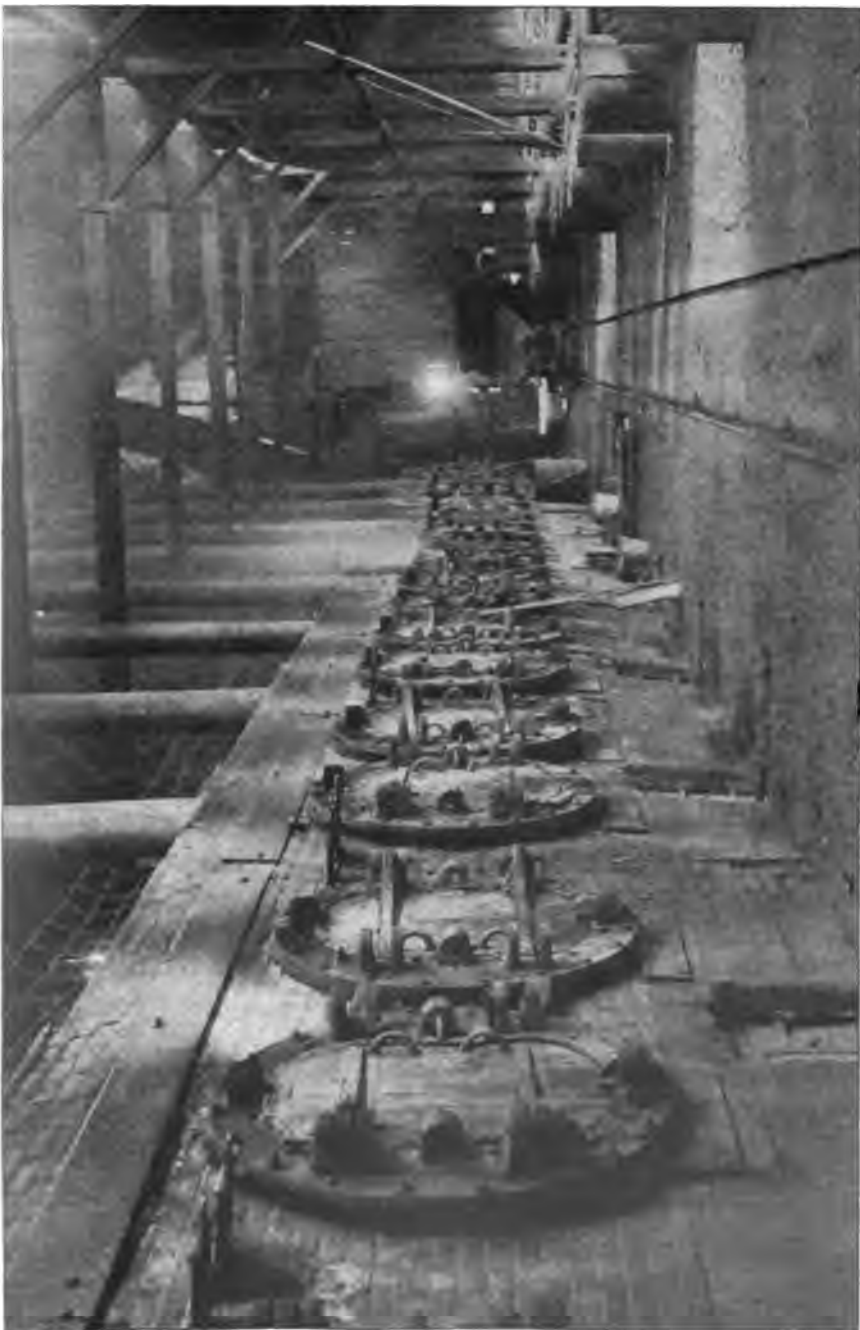
In some factories barrel filling is performed automatically. In most places rubber pipes are used, and in no instance was it observed that reliefs were provided to carry off the vapors to the outer air. As the alcohol is discharged into the barrel vapor is formed, which is pushed out into the work room as the barrel is filled. The operator, who is often near the barrel, inhales these vapors. Therefore, the vapor should be carried outside, which can be done by a small pipe or hose.

#### **DANGERS IN THE USE OF WOOD ALCOHOL IN THE INDUSTRIES**

Wood alcohol is used extensively in the arts and crafts. It serves as a solvent for gums, dyes and resins, and as a basic material for the manufacture of various dyes used in the manufacture of leather. Varnishes in which wood alcohol is used possess the advantage of drying quicker than those made with ethylic or grain alcohol. Wood alcohol is the more volatile — having a lower boiling point it dries faster.

Figure 6

Battery of retorts, showing cast iron doors, method of ventilation by means of louvres above retorts and kilns for drying the acetate of lime above retorts.



Wood alcohol is used in many industries where shellac is used. Among these are hat manufacturing, dyeing and stiffening of artificial flowers, making picture frames, applying varnish to the interior of beer vats, shellacing knots in boards, varnishing furniture, pianos, pencils, toys and wooden patterns. It is also used in stiffening hats, making varnish and lacquers, and dyes and numerous chemicals. Even typists use it to clean the type of the machines without any knowledge as to its properties.

Many cheap varnishes now contain denatured alcohol, that is, grain alcohol to which wood alcohol or other substances have been added. This mixture renders the alcohol undrinkable. Indeed wood alcohol is the chief denaturant for alcohols used in industry. It should be borne in mind, though, that alcohol denatured by wood alcohol is in most respects as harmful to health as pure wood alcohol.

In our investigation only those industries were considered and factories visited where it was known that quantities of the liquid were used. The following trades were included in the investigation: Hat manufacture, dyeing of artificial flowers, making picture frames, varnishing brewery vats, manufacturing pencils and making varnish.

#### **Manufacturing of Artificial Flowers**

The making of artificial flowers is principally carried on in the City of New York. The dyes used are those chiefly known as aniline dyes, which dissolve in alcohol. The application of the dye to the petals, stems, leaves, stamens, corolla and other parts is performed by dipping the parts in the dye and hanging them up to dry, whereby evaporation of the solvent takes place. Some dyes dissolve more readily in wood alcohol than grain alcohol, and careful questioning revealed the fact that denatured alcohol did not produce as satisfactory results as straight wood alcohol.

In many instances, the vapors were noticeable in all parts of the work room 75 feet distant from the point where the dipping and drying were performed. Chemical analyses made in one factory revealed two parts of the wood alcohol per ten thousand volumes of air by weight. It is essential that all such dyeing be done beneath an enclosed hood, and drying, particularly where quantities of material are dried, be carried on in rooms separate from the main workrooms. These drying rooms should be thoroughly ventilated by artificial means.

Physical defects of twenty workers (dyers of artificial flowers) were noted, consisting of dermatitis, or skin inflammation, anaemia, near sightedness and conjunctivitis, or inflammation of the delicate membrane which lines the lids and covers the eyeball.

#### **Pencil Manufacturing**

The varnishing of pencils is mainly performed by girls and women. In one factory, wood alcohol was exclusively used as a solvent for shellac, while in another denatured alcohol was used for this purpose. When the wood alcohol was used a number of physical ailments due to its use were found. The foreman of this factory stated that the benzene in the denatured alcohol, which previously had been used, had a deleterious effect upon the varnish and made an unsatisfactory finish on the pencils. The foreman did not know that a substitution is permitted in special denatured alcohol. The substitution is one half per cent of pyridin, and when used, the collector of Internal Revenue requires a bond in order to prevent abuse of the privilege. In plants, where the denatured alcohol was used, foremen claim it to be absolutely satisfactory, and in these factories no physical ailments could be found traceable to the use of wood alcohol.

#### **Furniture Manufacture**

In none of the plants visited was wood alcohol used as a diluent of the varnish applied. Denatured alcohol was used for this purpose and, according to reports of foremen and workmen, rendered satisfactory results. No physical defects were noted traceable to use of wood alcohol.

#### **Manufacture of Picture Frames**

In the manufacture of picture frames, wood alcohol is extensively used in cutting the shellac. The proprietor of one firm claimed he never had tried to use denatured alcohol. Conjunctivitis and headache seemed to be the principal complaints from which the varnishers suffered. Three cases of each were noted.

#### **Manufacture of Varnish**

Varnishes are solutions of gums and resins in various solvents. Unless specially ordered, wood alcohol is not used, but it formerly entered into the composition of many varnishes.

Varnish removers contain wood alcohol, but present prices of the product has greatly lessened its use. It would be difficult to attribute headaches or conjunctivitis in varnish manufacturing establishments to the use of wood alcohol, as heat, benzene, turpentine and the volatile substance likewise produce similar effects.

#### Brewery Vat Varnishing

The varnishing of vats in breweries has in the past been the cause of considerable blindness and death, due to the use of wood alcohol in shellacing the interior of these tanks. The worker obliged to perform this task must enter the tank, which is almost entirely closed. The volatile liquid evaporates in this large surface, out of which the vapors cannot readily escape. Naturally, a man so confined readily absorbs a large quantity of the vapor by inhalation.

Grain alcohol and denatured alcohol are now almost entirely used as solvents of shellac for this work. A private agreement was made in 1915 between the Board of Health of the City of New York and the breweries of that City in which the latter agreed to use no more wood alcohol in varnish used to apply to the interior of the vats.

The use of combination masks and goggles is now resorted to by breweries. Two deaths and four cases of permanent blindness were traced to varnishing of such vats by the Division of Industrial Hygiene of the Bureau of Inspection of this Department during the past two years.

#### Hat Manufacturing

Shellac is used in the stiffening of both felt and straw hats. In two factories visited, denatured alcohol was used, and as the hands of the workers came into direct contact with the solution, several cases of dermatitis of skin inflammation of the hands resulted. One case of conjunctivitis with swelling of the eyelids was found, resulting from the use of the solution, which contained wood alcohol as a denaturant, into which the operator placed his hands.

Two of the establishments visited were engaged in the manufacture of hat frames. Refined wood alcohol, *not* labeled according to law, was used to dissolve the shellac, which in turn was used to stiffen the frames. Although no physical defects were noted among those handling the material while it evaporated, the workers could not avoid inhaling some of the vapors thus given off. As the work was performed near



open windows, through which a draught was blowing, a much smaller amount of alcoholic vapors was given off and inhaled than would have been the case had the work been performed within a closed room.

Several panama hat factories were visited in which wood alcohol was used to dissolve shellac. Although the hands of the workers came in contact with the solution, but one case of dermatitis was found.

#### Cases of Wood Alcohol Poisoning Due to Inhalation of its Vapors

Numerous cases of poisoning were investigated, of persons suffering either with blindness or dying. Cases where death was caused by drinking material containing the wood alcohol are not included.

Case No. 1. Worked four days at varnishing beer vats, died on the fourth day after suffering from headaches, delirium, blindness, stupor and convulsions. Diagnosis: wood alcohol poisoning.

Cases No. 2-3. Varnished interior of beer vats, varnish contained wood alcohol. Both cases died from inhalation.

Cases Nos. 4-5-6. Varnishing beer vats; after working two days, case 4 became ill with nausea, dizziness and finally lost sight. His two fellow workmen died two or three days later.

Case No. 7. Engaged at beer vat varnishing, worked steadily for one week, became ill, lost sight; diagnosed as blindness, caused by wood alcohol poisoning.

Case No. 8. Engaged at interior beer vat varnishing, worked steadily for one week, became ill, lost sight; case diagnosed as blindness, caused by wood alcohol poisoning.

Cases No. 9. Same as Case No. 6.

Cases No. 10-11. Miss E. W. & L. K., worked at pencil varnishing, suffered from headache, dizziness and nausea followed by blurred and dimmed vision, all of which occurred twice daily while at work. Both claimed that when going into the open air, the symptoms vanished. However, the constant attacks caused a gradual impairment of vision.

Case No. 12. Employed at copper refining was blinded by use of wood alcohol during process of work.

Case No. 13. O. C., age 41 years, worked in the wood alcohol refinery for three months, stated he had no temporary blindness while working in refinery, but suffered temporary blindness once while working in crude still house.

Case No. 14. E. A., age 19 years, worked in still house of wood alcohol plant for one year, complains sight is impaired since working in still house.

Case No. 15. Worked in still house fourteen years, complained of temporary blindness a number of times; blindness lasted fifteen to twenty-four hours, suffered more in cold weather than in warm. Suffered pain in the eyes and with indigestion while engaged in cleaning stills.

Case No. 16. F. R., age 32 years, worked in a still house of a wood alcohol factory for seven years. Had temporary blindness twice while working for another firm, same trade. Not in factory at present, but frequently troubled with blurred vision and near sightedness.

Case No. 17. J. T. M., age 60 years, worked in still house of wood alcohol factory, complains he gets blind three or four times a month, at each time his eye lids close tightly and he is unable to open them; suffers severe pain and can't sleep for twenty-four hours at a time, when the blindness occurs.

## CONCLUSIONS

The fumes of wood alcohol are an irritant to the skin and mucous membrane, especially the palpebral and ocular conjunctiva. Inflammation of the hands and arms frequently occurs among workers exposed to the fumes or handling wood alcohol; conjunctivitis, at times with a swelling of the lids, occurs among workers when exposed to the fumes; nearsightedness, dim and blurred visions are frequent; headaches and acute amblyopia, which is really a temporary blindness, lasting from twenty to forty hours, frequently occurs; also, a permanent blindness and at times death ensues as the result of the inhalation of the fumes. The wood alcohol acts both locally as an irritant and internally as a poison. The local action may be due to the direct contact of the wood alcohol as we find in the case of a worker employed at hat stiffening. This process of the work necessitates the worker's hands coming in contact with the liquid. It may also be due to the fumes coming in contact with the skin or mucous membranes. It acts internally when inhaled or drunk.

The amblyopia, or temporary blindness, is due to the action of the wood alcohol upon the optic nerve, and also to its action upon the ocular conjunctiva. It is different from that of the permanent blindness, in that the production of the permanent blindness is due to the degeneration of the optic nerve as the result of a cumulative acidosis, due to formic acid oxidation. The temporary blindness is apparently an acute inflammatory condition, and since there is an actual blindness there may also be a paralysis of the nerves present.

Death occurs from wood alcohol poisoning as the result of a toxemia which is due to an accumulation of formic acid in the system in a sufficient quantity to cause a poisoning of the central nervous system. The sooner the vagus nerve is affected, the quicker death follows, as this nerve supplies the inhibitory action of the heart and the muscles of the chest.

The fumes of denatured alcohol, when the denaturant is wood alcohol, are just as dangerous as the fumes of refined or crude wood alcohol. It would seem that the direct action of the fumes of liquid crude wood alcohol on the skin or mucous membranes is more dangerous than the fumes of refined wood alcohol, and that it is just the contrary in its effect upon the system. Therefore, when denatured alcohol is used in a process containing 5 per cent or more of wood alcohol, the

rules applying to wood alcohol should also apply to said denatured alcohol.

Orders have been issued by the investigators rectifying conditions to which the labor law applies. However, additional rules are necessary before cases of wood alcohol poisoning can be greatly lessened. The following rules if rightly observed would practically eliminate the dangers described in this Bulletin. At the same time their observance by manufacturers would involve but little expense.

#### Proposed Rules

1. In any factory where the amount of wood alcohol exists in the atmosphere to the extent of one part per ten thousand volumes of air, means of ventilation shall be provided to remove same as far as possible.

2. All jugs, bottles, cans, barrels or other receptacles in which wood alcohol is stored, shall be properly labelled "wood alcohol — poison." (skull and cross bones).

3. In processes where wood alcohol is used by employees, which requires that the hands of the operators come in direct contact with this material, impervious gloves shall be furnished by the proprietors of such factories, who shall see to it that they are kept in good condition.

4. Whenever it is necessary to enter an enclosure, tank, or still in which vapors of wood alcohol are present, a gas helmet or other device shall be provided by the proprietor and worn by the person obliged to enter such enclosure, tank or still. Fresh air, free from contamination, shall be supplied through a hose within the helmet. All vats, pans, cans, or other receptacles, containing wood alcohol shall be provided with tight covers.

5. Whenever wood alcohol is used or manufactured in the process as an incident of the business carried on, a printed sign shall be kept posted in all such workrooms, calling attention to the dangerous nature of wood alcohol. This sign shall be prepared by the Department of Labor of the State Industrial Commission for free distribution.

6. A run-board or walk should be provided in each kiln, for the use of employees on which to stand while spreading the acetate of lime being dried, thus enabling them to occasionally step from the highly heated material.







## Bulletins of the New York State Department of Labor

**Quarterly Bulletins.** The publication of a quarterly Bulletin was begun by the former Bureau of Labor Statistics in 1899 and continued by the Department of Labor (into which that Bureau was incorporated in 1901) until 1913. of these Quarterly Bulletins (Nos. 1 to 56, constituting Vols. I to V, or one for each year, 1899-1913) only the following numbers can now be supplied: 2 (1899); 35 (1907); 36, 37, 38 (1908); 47, 48, 49 (1911); 50, 51, 52 (1912); 54 (1913).

**Special Bulletins.** In 1914 the quarterly Bulletin was superseded by the present series of special Bulletins on particular subjects. The lists of these Special Bulletins is as follows:

### Year 1914

- No. 57. Idleness of Organized Wage Earners on September 30, 1913 (7 pages). *Out of print.*
- No. 58. Idleness of Organized Wage Earners in 1913 (53 pages). *Out of print.*
- No. 59. Digest of the New York Workmen's Compensation Law (31 pages). *Out of print.*
- No. 59. (Revised). The Workmen's Compensation Law (47 pages). *Out of print.*
- No. 60. Statistics of Trade Unions in 1913 (145 pages).
- No. 61. Idleness of Organized Wage Earners in the First Half of 1914 (16 pages).
- No. 62. New York Labor Laws of 1914 (100 pages). *Out of print.*
- No. 63. Directory of Trade Unions, 1914 (104 pages). *Out of print.*
- No. 64. Changes in Union Wages and Hours in 1913 (116 pages). *Out of print.*
- No. 65. Union Rates of Wages and Hours in 1913 (186 pages). *Out of print.*
- No. 66. Strikes and Lockouts in 1913 and 1914 (136 pages).
- No. 67. International Trade Union Statistics (24 pages).
- No. 68. Statistics of Industrial Accidents in 1913 and 1914 (175 pages).

### Year 1915

- No. 69. Idleness of Organized Wage Earners in 1914 (41 pages).
- No. 70. New York Court Decisions Concerning Labor Laws (118 pages).
- No. 71. Government Labor Reports, October, 1913, to May, 1915 (20 pages).
- No. 72. New York Labor Laws of 1915 (67 pages).
- No. 73. Idleness of Organized Wage Earners in the First Half of 1915 (16 pages).
- No. 74. Statistics of Trade Unions in 1914 (146 pages).

### Year 1916

- No. 75. Statistics of Industrial Accidents, 1914 (77 pages).
- No. 76. European Regulations for Prevention of Occupational Diseases (77 pages). *Out of print.*
- No. 77. Industrial Accident Prevention (54 pages).
- No. 78. New York Labor Laws of 1916 (68 pages).
- No. 79. Anthrax (23 pages).

### Year 1917

- No. 80. Fatal Accidents Due to Falls in Building Work (36 pages).
- No. 81. Court Decisions on Workmen's Compensation Law (408 pages).
- No. 82. Hoods for Removing Dust, Fumes and Gases (23 pages). *Out of print.*
- No. 83. Dangers in Manufacture of Paris Green and Scheele's Green (15 pages).
- No. 84. New York Labor Laws of 1917 (63 pages).
- No. 85. Course of Employment in New York State, 1904-1916 (50 pages).
- No. 86. Dangers in the Manufacture and Industrial Uses of Wood Alcohol (18 pages).

**Monthly Bulletin.**—In October, 1915, was begun the publication of a monthly Bulletin as the official organ of the Industrial Commission which now administers the Department of Labor. The purpose of this Bulletin is to give current information concerning the work of the Department and the official acts of the Commission. The issues for October, 1915, to April, 1916, are out of print.

**The Labor Market.** In October, 1915, the publication of a monthly Labor Market bulletin was begun, containing statistics compiled from returns of representative manufacturers and city building departments. The first issue contained figures for June to December, 1915. The issues for October, 1915, to April, 1916, are out of print.







